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Supreme Court, U.S.
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NO. 04-041205

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

JAMES J. CLANCY, acting as a Private Attorney General and for himself,
PETITIONER

v.

A.T.&T. CORP., a New York Corporation; **COMCAST CORP.**, a Pennsylvania Corporation; and **COMCAST OF CALIFORNIA VII, INC.**, a Washington Corporation,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case raises important, recurring questions relating to the interaction of federal law with state consumer laws. **California Business & Professions Code §§ 17200 *et seq.*** makes actionable as an "unfair business practice" any business act or practice that violates a federal or state law.

1. With respect to cable television, does federal law ban the transmission by cable operators of obscene programming, even to "consenting adults"?

2. Where violations of federal or state obscenity law are actionable in a state civil lawsuit, did the State Court refusal to determine the question of obscenity raised by the Complaint violate petitioner's federal Constitutional right to **Due Process of Law** or **Equal Protection of the Law**?

3. In sustaining a demurrer and dismissing a civil complaint based upon alleged violations of state and federal obscenity laws as factually insufficient to state a cause of action, has petitioner's right to federal **Due Process of Law** or **Equal Protection of the Law** been violated, where both the state trial and appellate courts have:

> **(1)** refused to review videotaped copies and **Time and Motion Studies** of cable television programming contested to be obscene, which were pleaded by incorporation and filed contemporaneously with the civil obscenity complaint in accordance with State Procedural Law, and
>
> **(2)** refused to grant petitioner/plaintiff a hearing on the issue of the obscenity ***vel non*** of said programming to determine whether said programming was ***per se*** obscene (as a matter of Law)?

PARTIES TO THE PROCEEDINGS

Petitioner is James J. Clancy, as a Private Attorney General on behalf of the People of the State of California, and for himself.

Respondents are A.T.&T. Corp., a New York Corporation; and both Comcast Corp., a Pennsylvania Corporation, and Comcast of California VII, a Washington Corporation.

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IN THE SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION 1.

PETITION FOR A WRIT OF CERTIORARI

James J. Clancy, as a Private Attorney General on behalf of the People of the State of California, and himself, respectfully petitions for a writ of certiorari to review two related judgments [No. **B 168827** and **B 171529**] considered concurrently by the California Court of Appeal, Second Appellate District, Division One, in this case, in connection with orders dismissing petitioner's complaint, filed October 4, 2002, without leave to amend.

OPINIONS BELOW

The orders of the California Supreme Court denying a

hearing in **B168827** (**App. A, *infra.***) and **B171529** (**App. B, *infra.***) were filed on November 17, 2004. The opinion of the California Court of Appeal in **B168827**, 2004 Cal. App. Unpub. LEXIS 7996 (August 31, 2004, filed) (**App. C, *infra***), and **B171529**, 2004 Cal. App. Unpub. LEXIS 7998 (August 31, 2004, filed) (**App. D, *infra.***), were unreported.

JURISDICTION

The judgment of the California Court of Appeal in both **B168827** and **B171529** was entered on August 31, 2004. A petition for hearing in **B168827** was denied and entered on November 17, 2004 (**App. A, *infra.***). A petition for hearing in **B171529** was denied and entered on November 17, 2004 (**App. B, *infra.***). The jurisdiction of this Court is invoked under **28 U.S.C. § 1257**. The controlling issue in the state court case involves federal issues arising under the United States Constitution and under federal obscenity laws and treaties.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides: "Congress shall make no law * * * abridging the freedom of speech, or of the press." **The Fourteen Amendment to the United States Constitution** provides in relevant part that

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; no shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The Federal Commerce Clause, Article 1, § 8 states: "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian

tribes."

3. The Federal Supremacy Clause, Article VI of the United States Constitution states:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

4. 47 U.S.C. §552(d)(1) states:

> "Nothing in this title [47 USCS §§ 521 *et seq.*] shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title [47 USCS §§ 521 *et seq.*]." [1/]

5. 47 U.S.C. § 558 states:

> "Nothing in this subchapter shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 532 of this title or under similar arrangements *unless the program involves obscene*

[1/] See ***State of Texas, Plaintiff v. Synchronal Corporation, Synchronal Group, Inc., et al.***, 800 F. Supp. 1456 (1992) (**47 U.S.C., §§ 552(d)(1) and 558** indicate "Congress' express purpose is to authorize, not preempt, application of state law in the realm of consumer protection in the cable television industry.")

material." [Emphasis added]. [2/]

6. 47 U.S.C. § 559 states:

"Whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined under title 18 or imprisoned not more than 2 years, or both."

7. 18 U.S.C. § 1466 states:

"Whoever is engaged in the business of selling or transferring obscene matter, who knowingly receives or possesses with intent to distribute any obscene * * * film * * * which has been shipped or transported in interstate or foreign commerce, shall be punished by imprisonment for not more than 5 years or by a fine under this title, or both."

8. 18 U.S.C. § 1468 states:

"(a) Whoever knowingly utters any obscene language or distributes any obscene matter by means of cable television or subscription services on television, shall be punished by imprisonment for not more than 2 years or by a fine in accordance with this title, or both.

"(b) * * * "distribute means to send, transmit, retransmit,

[2/] In 1992, Congress enacted **Pub.L. 102-385**, which inserted the concluding phrase ("*unless the program involves obscene material*") as an amendment to **Section 638** of the **Communications Act of 1934 (47 U.S.C. § 558)**, in order to clarify Congressional intent to made cable companies liable for carrying obscene programs on leased access channels. This amendment closed "an unforeseen loophole" in the **1984 Cable Act**, and specifically rejected and reversed the holding of ***Playboy Enterprises, Inc. v. T.S.C. of Puerto Rico***, 698 F.Supp. 401 (D.Puerto Rico 1988). Under current federal law, cable operators are liable for the transmission of obscene programming over leased access channels.

telecast, broadcast, or cablecast, including by wire, microwave, or satellite, or to produce or provide material for such distribution.

"(c) Nothing in this chapter, or the Cable Communications Policy Act of 1984, or any other provision of Federal law, is intended to interfere with or preempt the power of the States, including political subdivisions thereof, to regulate the uttering of language that is obscene or otherwise unprotected by the Constitution or the distribution of matter that is obscene or otherwise unprotected by the Constitution, of any sort, by means of cable television ro subscription services on television."

9. California Penal Code § 311.2 states:

"(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, produces, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is for a first offense, guilty of a misdemeanor. If the person has previously been convicted of any violation of this section, the court may, in addition to the punishment authorized in Section 311.9, impose a fine not exceeding fifty thousand dollars ($ 50,000)."

10. California Business & Professions Code § 17200 [3/]

[3/] See ***People v E.W.A.P., Inc.*** (1980, 2nd Dist) 106 Cal App 3d 315, 165 Cal Rptr 73. (The trial court erred in sustaining a demurrer to the People's complaint seeking an injunction and assessment of civil penalties for unlawful business practice as defined by **Business & Professions Code § 17200**, where the complaint alleged that defendants, a corporation and its officers, had been engaged for approximately one year prior to the filing of the complaint in commercially distributing and possessing for commercial distribution obscene matter as defined in **Pen C § 311(a)**, and specifically had distributed or

states:

> "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

11. California Civil Code § 3479 states:

> " Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance." [4/]

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possessed for distribution various copies of 44 named obscene films and various copies of three named obscene magazines. Though **Business & Professions Code § 17200**, deals with "unfair competition" it is liberally construed to extend the meaning of that term to anything that can properly be called a business practice and that at the same time is forbidden by law. The complaint adequately alleged unlawful conduct as a business practice. It was not necessary additionally to allege specifically that the unlawful business practice was anti-competitive or harmful to consumers. The fact that certain conduct is a crime will not prevent the issuance of an injunction if the conduct also falls within a specific statute authorizing an injunction, and **Business & Professions Code § 17202**, specifically authorizes injunctions and civil penalties in addition to the remedies of the penal law.)

[4/] See ***People v Projection Room Theater***, 17 C3d 42, 130 Cal Rptr 328, 500 P2d 600 (1976). (For the purpose of regulation under the public nuisance statutes (**California Civ. Code, §§ 3479, 3480; Pen. Code, §§ 370, 371**), there is no satisfactory distinction which would justify differential treatment of the pictorial representations in obscene magazines and films on the one hand, and "live" performances on the other. The presentation of either may be fairly described as "indecent" and equally injurious to public morals.)

12. California Civil Code § 3480 states:

> "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." [5]

STATEMENT

This case raises important, recurring questions relating to the interaction of a state consumer law (*see* **California Business & Professions Code, §§ 17200 *et seq.)*** that

> "borrows" [6] *any* federal or state law (here: federal and state obscenity laws banning the transmission of obscene cable television programming) to give plaintiff's standing and a cause of action to prosecute the violation of said laws as an "unfair business practice."

Petitioner's obscenity lawsuit against several cable television operators, programmers, and government officials was improperly dismissed for failure to state causes of action against the named defendants. Petitioner sued the named defendants for their role in transmitting pay-per-view hardcore pornographic programming that was obscene. Petitioner's complaint asserted that the cable

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[5] See note 4, *supra.*

[6] See note 3, *supra.* **§ 17200**, dealing with unfair competition, has been liberally construed to extend the meaning of that term to anything that can properly be called a business practice and that at the same time is forbidden by law. When determining whether a practice is "unlawful," **§ 17200** "borrows" violations of other laws, and makes them independently actionable under **§17200**. ***Cel-Tech Communications, Inc., v. Los Angeles Cellular Telephone Co.***, 20 Cal.4th 163, 180 (1999). Virtually any law -- federal, state or local -- can serve as a predicate for a **§ 17200** claim. ***Stevens v. Superior Court***, 75 Cal.App.4th 594, 602 (1999). *See, also,* ***People v. E.W.A.P.***, 106 Cal. App. 3d 315 (1980), and ***Stop Youth Addiction, Inc. v. Lucky Stores, Inc.***, 17 Cal. 4th 553 (1998).

programming was obscene under state and federal obscenity laws, and thus defendants were engaging in unlawful business practices in violation of **California Business and Professions Code § 17200**. This case embodies the exceptions set forth in ***Fiske v. Kansas***, 274 U.S. 380, 385-86 (1927). This Court has made independent examination of facts that are intermingled with legal conclusions in cases arising in state court, when it is necessary in order to decide whether a person has been deprived by a state court of a right secured by the Constitution, or whether some other federal interest has been unduly subordinated by a state court (here, the federal interest negatively affected by the state court decisions includes the federal supremacy clause and the federal interest in the enforcement of federal obscenity laws banning the transmission of obscene cable television programming). Areas of state court findings that are subject to United States Supreme Court assessment include findings relating to the proper application of obscenity standards. ***Jacobellis v. Ohio***, 378 U.S. 184, 189 (1964). This Court's

> "duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case * * * has been particularly true where rights have been asserted under the First Amendment guarantees of free expression"

and see ***New York v. Ferber***, 458 U.S. 747, 774 n. 28 (1982); ***Miller v. California***, 413 U.S. 15, 25 (1973).

The Record below (see 2004 Cal. App. Unpub. LEXIS 925, pp. 17-19) demonstrates that petitioner raised the issue that this case was controlled by federal obscenity law. The Court states: "In his first contention, plaintiff claims that this case is controlled by federal obscenity law and *People ex rel. Busch v. Projection Room Theater* (1976) 17 Cal.3d 42, 130 Cal. Rptr. 328." In refusing to review the videotapes and time and motion studies, the California Court states:

> "The question before the trial court was whether plaintiff stated cause of action against the named defendants. If that question could be answered without reviewing the materials provided by plaintiff, we see no reason why the trial court

should have been required to review them."

However, since the complaint's causes of action depended on establishing that the contested subject matter was obscene, the trial court could not "answer without reviewing the materials provided." The trial court was constitutionally required to review the videotapes and time and motion studies in its possession, and was obligated to determine whether the cable television programming contained therein was obscene. In conducting its ***de novo*** review, the California Court of Appeal was required to review the materials provided which had been pleaded by incorporation as part of petitioner's complaint. The state courts' refusal to conduct a proper review of the obscenity question constituted federal constitutional error.

REASONS FOR GRANTING THE PETITION

I. THE SPECIFICALLY NAMED EXAMPLES OF RESPONDENTS' CABLE TELEVISION PROGRAMMING, LODGED WITH THE STATE COURTS AND INCORPORATED BY REFERENCE WITHIN PETITIONER'S COMPLAINT, WERE OBSCENE UNDER FEDERAL CONSTITUTIONAL STANDARDS, AND THEIR TRANSMISSION OVER CABLE TELEVISION VIOLATED FEDERAL LAW.

Federal statutory law has established a national policy that clarifies the system of local, state and Federal regulation of cable television. Congress has taken control of cable television and ceded back to the local authorities certain limited powers, with the aim of achieving a nationwide uniformity of regulation. As set by Congress, this national cable television policy defines and limits the authority and "discretion" that a franchising authority may exercise through the franchise process. Local and state authorities may not legalize the transmission of cable television programming that is obscene under federal Constitutional standards.

Congress has imposed an absolute ban against the

transmission of obscene cable television programming, [7] but permits the states to prosecute obscene cable television under state law, as long as state procedures do not conflict with federal law. *See, for example,* ***State of Nebraska v. Harrold***, 256 Neb. 829 (1999), *cert. denied* January 24, 2000, 2000 U.S. LEXIS 921 [state criminal prosecution of obscene cable television programming].

In this case, petitioner's complaint alleged that the specifically named and identified cable television programming was "obscene ***per se***": clearly obscene under any standard, and that it violated both federal and state obscenity law. Both the trial and appellate courts refused to review the obscenity ***vel non*** of the contested subject matter, under either a federal or state Constitutional or statutory standard. With respect to the federal cable television programming laws involved, the California courts' steadfast refusal to review the obscene subject matter complaint raises the issue of the preemptive scope of federal obscenity law.

Because the Complaint specifically alleges that respondents' conduct violated federal obscenity law, the state court could not lawfully refuse to examine the obscenity ***vel non*** of the subject matter. In connection with petitioner's complaint, the state court was obliged to utilize federal Constitutional obscenity standards in making judicial determinations regarding the obscenity of the specifically named cable television programming. In addressing violations of the federal obscenity law, the state courts could not lawfully ignore the contours of federal governmental regulation enunciated in ***Miller v. California***, 413 U.S. 15 (1973) and ***Paris***

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[7] See **47 U.S.C., §§ 558 and 559** (prohibiting dissemination of "obscene or otherwise unprotected material" via cable TV). **18 U.S.C., § 1464** (prohibiting dissemination of obscene material over broadcast television operations), **§ 1468** (prohibiting dissemination of obscene material over cable or satellite operations), **§ 1466** (prohibiting commercial "engaging in business of selling or transferring obscene matter), **§ 1465** (prohibiting use of facility or means of interstate or foreign commerce). The transmission of obscene material, in a subscription TV context, has specifically been held to be contrary to the public interest. See ***Monroe Communications Corp. v. FCC***, 900 F.2d 351 (1990).

Adult Theatre I, et al. v. Slaton, 413 U.S. 49 (1973); , and their progeny. *See, for example,* ***Smith v. United States***, 431 U.S. 291 (1977) [even where a State has no obscenity law, so that no state law was violated by the mailing of sexually oriented materials to locations within the State, defendant was guilty of the federal obscenity law which prohibits the transmission of obscene materials using the mail. Here, federal law forbids the use of cable television to transmit obscene programming].

To exacerbate matters, the California Courts not only refused to apply federal obscenity law, they in effect "closed the door to the courtroom" in the face of the petitioner, by dismissing the complaint without addressing on the Record any of the substantive claims of the complaint with respect to the obscenity of the cable television programming, or petitioner's claim that said programming was transmitted in violation of state and federal obscenity law. Where obscenity is properly at issue, no state can be permitted to dismiss an obscenity complaint without actually reviewing the underlying subject matter alleged to be obscene.

Recently, this court has emphasized that the right of access to the courts is a fundamental right, and is guaranteed as a substantive right under the **Federal Constitution**. Infringement of the right to access to the courts is subject to heightened judicial scrutiny. See, e.g., ***Tennessee v. Lane***, 541 U.S. 509, 158 L.Ed. 2d 820, at 837 (2004), citing ***Dunn v. Blumstein***, 405 U.S. 330, 336, 337. However, in order to secure this "fundamental right," "access" to a judicial forum must involve a *meaningful* adjudication. The Record in this case demonstrates that such was completely absent here, where on demurrer in a case alleging violations of state and federal obscenity laws, the state courts dismissed petitioner's complaint without reviewing the obscenity ***vel non*** of the contested material under either state or federal law.

The state thus deprived petitioner of his right to a hearing to determine the obscenity ***vel non*** on the named material under the procedure described in ***People v. Noroff***, 67 Cal. 2d 791 (1967) and ***People v. Noroff***, 58 Cal. Rptr. 172 (1967). This Court has

emphasized the importance of ultimately adjudicating the obscenity ***vel non*** of the underlying subject matter, where such is a contested issue, and has recognized its special and unique role in protecting important Constitutional rights by affording, in obscenity cases, review of the question of the obscenity ***vel non***, and has even granted post-state judgment of this issue. See ***Jenkins v. Georgia***, 418 U.S.153, at 160-161 (1974).

II. THE CALIFORNIA COURTS DENIED PETITIONER'S FEDERAL CONSTITUTIONAL DUE PROCESS RIGHT TO A JUDICIAL FORUM IN WHICH TO ADJUDICATE THE QUESTIONS RAISED BY HIS COMPLAINT.

State courts cannot erect obstacles barring individuals from full participation in the federal right to a meaningful judicial adjudication of complaints lawfully filed. The **Due Process Clause** requires the states to afford certain civil litigants a "meaningful opportunity to be heard." *Cf.*, ***Tennessee v. Lane***, 158 L.Ed. 2d, at 837, citing ***Boddie v. Connecticut***, 401 U.S. 371, 379 (1971), and ***M.L.B. v. S.L.J.***, 519 U.S. 102 (1996).

This case involves important recurring questions of federal due process and equal protection regarding an individual plaintiff's right to a judicial adjudication of the obscenity ***vel non*** of material named in a complaint and alleged to be obscene, in defense of his or her complaint on demurrer, regardless of whether the individual trial or appellate jurists agree with plaintiff's viewpoint, and regardless of whether petitioner represents the defense or the prosecution.

Because of **First Amendment** concerns, before dismissing plaintiff's complaint on demurrer, both the trial judge and the appellate jurists on review (who are required by State law to review the case ***de novo***), should have: .

> **(1)** examined the complaint in its entirety, including all exhibits to the complaint, such as the **Time and Motion Studies**, attached to the complaint and pleaded by

incorporation in this case, under applicable case authority specifically recognizing such a procedure, see ***People ex rel. Busch v. Projection Room Theater, et al.***, 17 Cal.3d 42 (1976); ***People ex rel. Busch v. Projection Room Theater, et al.***, 16 Cal.3d 350 (decided March 4, 1976, and vacated June 1, 1976); and ***Busch et al. v. Projection Room Theater, et al.***, 44 Cal. App.3d 56 (1974); and

(2) viewed the contested material (such as the videotaped or DVD copies of the cable television programming alleged to be obscene, contemporaneously lodged with the complaint at the time of its filing, and pleaded by incorporation in this case).

Instead, in this case both the trial court and the appellate court refused to review the material alleged to be obscene, and, in adjudicating and reviewing the propriety of the demurrer, refused to apply federal constitutional obscenity standards to petitioner's complaint, as required.

III. THE QUESTIONS ARE RIPE FOR REVIEW

Federal obscenity law controls here. Only action by this Court can correct and provide a remedy for the serious violations of federal constitutional and statutory law presented by this Record. Action by this Court will provide important guidance to consumers, the business community, and law enforcement with respect to the how federal obscenity law is to be applied the cable television environment.

Congress has completely banned the transmission of obscene cable television programming – yet very few plaintiffs have been brave enough to undertake court action in an attempt to ensure that federal law is followed. This may explain why the rate of compensation demanded by the cable operator to carry the "Adults Only" programming has proved to be so financially remunerative for the cable operator. Reportedly, in the past, as much as 80 to 90% of what the customer pays-per-view has been retained by the cable

operator.

Consumers have a right to complain about the crass nature of illegal pornographic materials, and its potential societal effects. A 1997 study (E. Oddone-Paolucci, M. Genius, and C. Violato) [8/] indicates pornography influences violence and family functioning: "While likely not a solitary influence, it appears that exposure to pornography is one important factor which contributes directly to the development of sexually dysfunctional attitudes and behaviors," placing individuals:

> **(1)** at increased risk for developing sexually deviant tendencies (*i.e.* non-normative sexual behaviors such as early age of first intercourse),
>
> **(2)** at increased risk for committing sexual offenses,
>
> **(3)** at increased risk for experiencing difficulties in intimate relationships (involving perceptions of dominance, submission, courtship, sex role stereotyping, or viewing persons as sexual objects), and
>
> **(4)** at increased risk for accepting the "rape myth" (*i.e.* Women cause rape/rapists are normal/ etc.).

In recent years, the medical profession has identified an increase in activities that may result in severe dependency or addictive behaviors, and has added "sexual addiction" to sexually explicit pornographic materials [9/] to the list of other deleterious

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[8/] E. Oddone-Paolucci, M. Genius, and C. Violato, "**A Meta-analysis of the Published Research on the Effects of Pornography**," Medicine, Mind and Adolescence, Vol. XII, no. 1-2, pp 101-112 (1997). Copyright 1997.

[9/] Today, the widespread dissemination of illegal Internet pornography raises a number of substantial social concerns. See, for example, Victor B. Cline, Ph.D., "**Pornography's Effects on Adults and Children**," (visited February 15, 2005) < http://www.moralityinmedia.org > in which Dr. Cline

conditions, such as addiction to gambling, alcohol, and other drugs. [10/] It is tragic to note that most of those "addicted" started off as "consenting adults." [11/]

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describes how pornography can destroy certain individuals. The author draws upon concrete examples, some of which are taken from his clinical practice. He identifies and discusses a progressive four-step pattern consisting of: (1) addiction, (2) escalation, (3) desensitization, and (4) acting out sexually. See also "**Treatment and Healing of Sexual and Pornographic Addictions**," (visited February 5, 2005) < http://www.moralityinmedia.org > in which Dr. Cline describes strategies useful in treating sexual addicts, particularly those addicted to pornography.

Researchers continue to study the negative effect of pornographic imagery on the brain and on behavior. As has been observed elsewhere, the brain is an incredibly complex and powerful system. Sophisticated medical diagnostic techniques confirm that images override text for brain dominance and research indicates that a pornographic environment "colonizes" in a viewer's brain, producing structural changes in the brain that are involuntary and can last for years. See Dr. Judith A. Reisman, "**Psychopharmacology of Pictorial Pornography Restructuring Brain, Mind and Memory and Subverting Freedom of Speech**", < http://www.drjudithreisman.com/brain.pdf > (visited February 5, 2005).

[10/] In ***Phalen v. Commonwealth of Virginia***, 49 U.S. 163 at 168 (1850), this Court observed:

> ". . . . The suppression of nuisances injurious to public health or morality is among the most important duties of government. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.
>
> "It is a principle of the common law, that the king cannot sanction a nuisance. . . ."

[11/] Federal law completely bans the cable television transmission of obscene pornographic material for all audiences (*i.e.*, it is illegal for both children and adults, including "consenting adults"). Under the so-called "***Miller* Test**," obscenity is pornographic material in which, taken as a whole,

CONCLUSION

Obscenity, by definition, is a patently offensive appeal to a prurient interest in sex and has no serious literary, artistic, political, or scientific value. [12/] Obscene cable television programming objectifies and crassly exploits human sexuality, is not protected by the **First Amendment**, and under federal law is and should continue to be completely banned.

The miscarriage of justice demonstrated by this Record is serious, but of even more concern is the effect that the open flaunting of federal law by the non-stop transmission of obscene material has had, and will continue to have on society, and its business community – which will continue unabated, unless stopped by this Court taking action in this case.

Dated: February 15, 2005 Respectfully submitted,

Carol A. Clancy

Carol A. Clancy
Counsel of Record
9055 La Tuna Canyon Road
La Tuna Canyon, California 91352

---

the following three essential elements coalesce or come together:

> **(a)** prurient appeal (*i.e.*, an erotic, shameful or morbid attraction to nudity, sex, or excretion);
>
> **(b)** sexual conduct (patently offensive representations or depictions of actual or simulated sexual conduct, including lewd exhibition of the genitals);
>
> **(c)** lack of literary, artistic, political, or scientific value.

[12/] ***Reno v. ACLU***, 521 U.S. 844, at 877, footnote 44 (1997); ***Miller v. California***, 413 U.S. 15 (1973); ***Roth v. United States***, 354 U.S. 476 (1957).

CERTIFICATE OF SERVICE

I, James J. Clancy, a member of the Bar of this Court, hereby certify that on this 15TH day of February, 2005, three copies of the within:

PETITION FOR A WRIT OF CERTIORARI

in the above entitled case were deposited in the U.S. Post Office with Priority Mail postage prepaid, and properly addressed to the below listed parties to the proceedings. I further certify that all parties required to be served have been served:

Clerk, Civil Filing
California Supreme Court
300 South Spring Street
Los Angeles, California 90013

Clerk, Civil Filing
California Court of Appeal
2nd Appellate District, Div. 1
300 South Spring Street
Los Angeles, California 90013

Clerk, Civil Filing
Hon. Michael B. Harwin, Dept. M
L.A. Superior Court, N.W. Div.
6230 Sylmar Avenue
Van Nuys, California 91401

Bill Lockyer
California Attorney General
Public Inquiry Unit
P.O. Box 94425
Sacramento, California 94244-2550
Re: **Unfair Competition Case. (See Bus.& Prof. Code, §17209, and Cal. Rules of Court, Rule 15(e)(2).)**

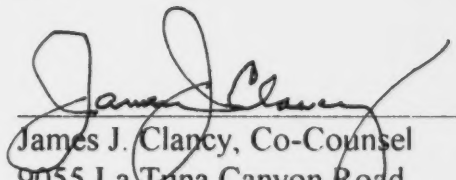
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Attorney of Record for ***A.T.&T. Corp., a New York Corporation*** (L.A.C.Sup.Ct.No. LC062475, CoA.No.**B168827**).

The Hot Network, ***The Hot Zone***, ***Vivid Video***, ***Vivid Entertainment Group***, ***Playboy Enterprises, Inc.***, ***Christie Hefner***, ***Playboy Entertainment Group*** (as ***Doe 3***) (L.A.C.Sup.Ct.No. LC062475, CoA.No.**B166374**).

Comcast Corp., a Pennsylvania Corporation (as ***Doe 4***), and ***Comcast of California VII, Inc., a Washington Corporation*** (as ***Doe 5***) (L.A.C.Sup.Ct.No. LC062475, CoA.No.**B171529**).

Dated: **February 15, 2005**



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APPENDIX A

ORDER OF THE CALIFORNIA SUPREME COURT DENYING A HEARING IN B168827

(Reference: *Petition for A Writ of Certiorari*, page 2.)

JAMES J. CLANCY, Plaintiff and Appellant, v. AT&T CORPORATION, Defendant and Respondent.

S128491

SUPREME COURT OF CALIFORNIA

2004 Cal. LEXIS 11184; 2004 Daily Journal DAR 13952

November 17, 2004, Filed

PRIOR HISTORY: [*1] Second Appellate District, Division One, No. B168827.

JUDGES: Brown, J., was absent and did not participate.

OPINION: Petition for review & publication request denied.

Brown, J., was absent and did not participate.

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APPENDIX B

ORDER OF THE CALIFORNIA SUPREME COURT DENYING A HEARING IN B171529

(Reference: *Petition for A Writ of Certiorari*, page 2.)

JAMES J. CLANCY, Plaintiff and Appellant, v. COMCAST CORPORATION ET AL., Defendants and Respondents.

S128468

SUPREME COURT OF CALIFORNIA

2004 Cal. LEXIS 11183; 2004 Daily Journal DAR 13952

November 17, 2004, Filed

PRIOR HISTORY: [*1] Second Appellate District, Division One, No. B171529.

JUDGES: Brown, J., was absent and did not participate.

OPINION: Petition for review & publication request denied.

Brown, J., was absent and did not participate.

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APPENDIX C

THE OPINION OF THE CALIFORNIA COURT OF APPEAL IN B168827, 2004 Cal. App. Unpub. LEXIS 7996 (August 31, 2004, filed)

(Reference: *Petition for A Writ of Certiorari*, page 2.)

JAMES J. CLANCY, Plaintiff and Appellant, v. AT&T CORP., Defendant and Respondent.

B168827

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

2004 Cal. App. Unpub. LEXIS 7996

August 31, 2004, Filed

NOTICE: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA. RULES OF COURT, RULE 977(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

PRIOR HISTORY: APPEAL from an order of the Superior Court of Los Angeles County, No. LC062475. Michael B. Harwin, Judge. DISPOSITION: Affirmed.

COUNSEL: James J. Clancy, *in pro. per.*, for Plaintiff and Appellant; Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria and Paul J.Cambria, Jr.; Labowe, Labowe & Hoffman and Mark S. Hoffman for Defendant and Respondent.

JUDGES: SPENCER, P.J.; ORTEGA, J., MALLANO, J. Concurred.

OPINION BY: SPENCER

OPINION:

INTRODUCTION

Plaintiff James J. Clancy appeals from an order of dismissal entered after the trial court sustained without leave to amend the demurrer of defendant AT&T Corp. and denied plaintiff's *ex parte* motion to file a supplemental complaint. This is plaintiff's second appeal in this action. He previously appealed from dismissals in favor of the other defendants in this action, following the sustaining of their demurrers without [*2] leave to amend. We affirmed those orders of dismissal. (*Clancy v. The Hot Network* (Jan. 29, 2004, B166374) [nonpub. opn.].) The Supreme Court denied review of our decision on April 14, 2004, S123214.

A third appeal from a dismissal in favor of other defendants in this action also is before this court. (Clancy v. Comcast Corporation, B171529.) In these appeals, which we consider concurrently, we again affirm the orders of dismissal.

FACTS

Plaintiff is an attorney, licensed to practice in the State of California, who lives in Sun Valley, in the City and County of Los Angeles. He has 38 years of experience, specializing in obscenity litigation.

Plaintiff receives cable television service from defendant AT&T Corp. (AT&T). n1 Broadcast on cable channels 96 (analog), 457 and 459 (digital) are "In Demand, Pay Per View, Adults Only" programs. These included *101 Cheerleaders & 1 Jock*, *Hell on Heels*, and *More Than a Handful 9*, broadcast between January 27 and April 30, 2001. AT&T broadcasts adult films and previews 24 hours a day. It charges $ 11.95 for receipt of a three-hour segment of the broadcasts, including two 75-minute films and two 15-minute previews. [*3]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 Plaintiff initially named American Telephone and Telegraph, Inc.

as a defendant. He later amended his complaint to name AT&T Corp.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

On January 27, 2001, plaintiff paid $ 11.95 to AT&T for "In Demand, Pay Per View, Adults Only" programs. AT&T broadcast into his home five adult motion pictures and additional previews. The previews advertised motion pictures produced by Vivid Entertainment Group, The Hot Zone and The Hot Network. n2 The previews advertised the motion pictures as containing "real, live, all-American sex-not simulated by actors."

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n2 Vivid Entertainment Group, The Hot Zone and The Hot Network were defendants below and parties to the previous appeal.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

Plaintiff began recording AT&T's "In Demand, Pay Per View, Adults Only" programs on a daily basis. Over 93 days-through May 1, 2001-he recorded 460 adult motion pictures broadcast [*4] on analog channel 96, including 121 different titles. From these recordings, he constructed time and motion studies regarding the depictions of sexual conduct in the motion pictures. From May 2, 2001 through August 5, 2001, plaintiff purchased and recorded adult motion pictures broadcast by AT&T on digital channel 457.

On June 30, 2001, Playboy Enterprises, Inc. (Playboy) announced that it had exercised its option to purchase the three fastest-growing adult television channels from defendant Vivid Video: Vivid T.V., The Hot Network and The Hot Zone. The option was owned and exercised by Playboy and Christie Hefner. The Hot Network, The Hot Zone, Vivid Video and Vivid Entertainment Group supplied adult programming to AT&T. n3

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n3 Playboy, Christie Hefner and Vivid Video were defendants below and parties to the previous appeal.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

James Hahn, Rocky Delgadillo and Los Angeles City Council (City) and Steve Cooley, Lloyd W. Pellman and Los Angeles County Board of Supervisors (County) have refused to acknowledge AT&T's [*5] broadcasts as an unlawful business practice and a public nuisance. They have failed to address AT&T's practices or abate those practices as a public nuisance. The County refused to file a civil proceeding against AT&T to stop the broadcasts after plaintiff requested that they do so. n4

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n4 The City and County also were defendants below and parties to the previous appeal.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

PROCEDURAL BACKGROUND

Plaintiff filed this action on October 4, 2002. He filed it in his own name, acting as a private attorney general. He identified his complaint as a "complaint in equity for: (1) a declaratory judgment; (2) the issuance of a specifically crafted 'emergency' rule nisi, order to show cause[n5]; (3) a partial summary judgment on that part of plaintiff's verified pleadings which are enhanced by autoptical proferences[n6]; (4) an accounting and forfeiture of unlawful profits; and (5) costs including attorney's fee . . . ."

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n5 A rule nisi is essentially an order to show cause. It is "[a] rule which will become imperative and final unless cause be shown

against it. This rule commands the party to show cause why he should not be compelled to do the act required, or why the object of the rule should not be enforced." (Black's Law Dict. (5th ed. 1979) p. 1196.) [*6]

n6 Autoptic proference is defined as "proffering or presenting in open court of articles for observation or inspection of the tribunal."

(Black's Law Dict., supra, p. 123.) In this case, the autoptic proferences "enhancing" plaintiff's complaint were videotapes of AT&T's broadcasts and time and motion studies of several of the films broadcast.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Specifically, plaintiff sought a declaration that AT&T could not assert as a defense that its broadcasts were made to consenting adults; that AT&T's broadcasts were unlawful per se hardcore pornography and constituted moral public nuisances and contraband. He sought the issuance of an order to show cause why AT&T should not be required to cease broadcasting hardcore pornography to consenting adult viewers. He sought a partial summary judgment on the pleadings as to the films depicted in the autoptic proferences incorporated in the complaint. He sought an accounting and forfeiture of At&T's unlawful profits derived from the broadcast of hardcore pornography between October 20, 2000 and October 2, 2002. Finally, he sought attorney's fees and costs. [*7] On page 32 of his complaint, plaintiff included a section titled "petition for writ of mandamus to abate public nuisances." Named in this cause of action were AT&T, for broadcasting hardcore pornography; The Hot Network, The Hot Zone, Vivid Video, Inc. and Vivid Entertainment Group, for supplying the hardcore pornography; Playboy and Christie Hefner, for owning and exercising the right to purchase The Hot Network, The Hot Zone and Vivid T.V.; and the City and County, for failing

and neglecting to abate public nuisances consisting of the broadcasts of hardcore pornography.

As part of this cause of action, plaintiff claimed he had standing to file a civil lawsuit to terminate AT&T's unlawful business practices under Business and Professions Code section 17200, to revoke their cable franchise, and to terminate a public and private nuisance. He also claimed entitlement to restitution of the money he spent to receive and record AT&T's broadcasts, plus punitive damages and attorney's fees. He claimed an additional right to file a class action lawsuit on behalf of other paying subscribers to AT&T broadcasts.

The City and County demurred on a number of grounds, [*8] including that they could not be compelled to take discretionary actions to abate a nuisance or to terminate cable transmission franchise contracts. The Hot Network, The Hot Zone, Vivid Video, Inc., Vivid Entertainment Group, Playboy Enterprises, Inc. and Christie Hefner also demurred on a number of grounds, including plaintiff's failure to state a cause of action and lack of standing.

AT&T demurred n7 on the grounds plaintiff failed to state causes of action against it for abatement of a public nuisance or for violation of Business and Professions Code section 17200. It also claimed plaintiff lacked standing to bring the action and his entire complaint was uncertain, ambiguous and unintelligible.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n7 AT&T Broadband filed the demurrer, noting it erroneously was sued as American Telephone and Telegraph, Inc.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Plaintiff opposed the demurrers. In opposition to AT&T's demurrer, he claimed that he had stated a cause of action, in that the three videotapes named in his complaint constituted [*9] obscenity

per se. As part of his opposition to the demurrer, he requested that the court take judicial notice of a portion of the Congressional Record dealing with the historical background of obscenity. Plaintiff also moved to amend his complaint to include as defendants AT&T Broadband, AT&T Corp. and Comcast Corp., as the entities responsible under the cable transmission franchise agreements for servicing the area in which plaintiff resided.

At the January 28, 2003 hearing on the demurrers, the trial court sustained all demurrers without leave to amend. It denied plaintiff's motion for leave to amend his complaint. It also denied his ex parte application for leave to make a video demonstration, finding "such a demonstration is not necessary for the purpose of these hearings." The trial court thereafter dismissed the action.

Plaintiff moved for reconsideration of the trial court's rulings. On March 17, 2003, the trial court granted the motion as to AT&T only, "due to service/identity issues."

AT&T subsequently filed a new demurrer. Plaintiff opposed it and, in addition, filed an ex parte motion for leave to file a supplemental complaint adding facts pertaining to Comcast Corp. [*10] , as AT&T's successor in interest. He also filed amendments to the complaint naming Comcast Corp. and Comcast of California VII, Inc. as Doe defendants.

The trial court sustained AT&T's demurrer without leave to amend and denied plaintiff's ex parte motion for leave to file a supplemental complaint. On May 14, 2003, it dismissed the action as to AT&T.

CONTENTIONS

In his brief, plaintiff sets forth 10 separate contentions. Most of these are the same as the contentions he raised in the previous appeal.

One of plaintiff's stated goals in this appeal is to have us

vacate our previous opinion and reconsider the issues he raised at that time. That opinion is now final, however, and we have no jurisdiction to vacate it and reconsider the issues raised therein. (Cal. Rules of Court, rule 24; *Ellenberger v. City of Oakland* (1946) 76 Cal. App. 2d 828, 830.)

Additionally, some of plaintiff's contentions relate to orders from which this appeal was not taken and defendants who are not parties to this appeal. We have no jurisdiction to consider them. (*Polster, Inc. v. Swing* (1985) 164 Cal. App. 3d 427, 436, 210 Cal. Rptr. 567.) [*11]

Plaintiff first contends that the performance of patently offensive representations of ultimate sexual acts, actual or simulated, in public, constitutes obscenity per se. As such, it is both a fraudulent business practice and a moral public nuisance. We need not address this contention, in that we conclude the trial court properly sustained defendant's demurrer without leave to amend and dismissed the action based on plaintiff's failure to state a cause of action against defendant AT&T.

Plaintiff further contends his complaint sets forth facts establishing desuetude with respect to obscenity law, states causes of action and standing by plaintiff as a private attorney general against defendant.

It "contemplates that plaintiff, as a private attorney general, will prosecute these causes of action to their conclusion in this civil moral public nuisance abatement action." We disagree. Plaintiff's complaint does not state causes of action against defendant and he has no standing to bring this action as a private attorney general.

Plaintiff asserts that the trial court, under the separation of powers doctrine, had the duty under the state and federal constitutions to examine his time and [*12] motion studies and to consider his standing to assume the role of a private attorney general pursuant to constitutional and statutory provisions of California law. The trial court's failure to fulfill its duty, he claims, violated his

rights to due process of law under the state and federal constitutions. We do not address this contention for the reasons stated above.

Plaintiff additionally asserts that defendant is responsible for the creation and maintenance of a public nuisance and for unfair competition, thus making the trial court's failure to follow controlling precedent on this issue and to apply the rule of stare decisis reversible error. We do not address the court's asserted failure.

Plaintiff avers the orders denying him a hearing on the issue of obscenity *per se* must be reversed, in that the trial court failed to follow controlling precedent articulated by Division Three of the Second District Court of Appeal. Plaintiff does not identify the orders to which he refers. To the extent they are orders other than the one from which he appealed, we have no jurisdiction to consider this contention. (*Polster, Inc. v. Swing, supra*, 164 Cal. App. 3d at p. 436.) [*13]

Plaintiff also avers it was plain error for the trial court to sustain defendant's demurrer on the basis of its written arguments, without addressing the material allegations of his verified complaint regarding *per se* obscenity and standing. He further avers that the trial court's failure to address the material factual allegations of his complaint and its refusal to review independently and determine de novo whether the contested material was obscene *per se* was arbitrary, capricious and inexcusable. The trial court's unorthodox procedures have no judicial support and constitute a violation of the doctrines of separation of powers and due process of law. We disagree.

Plaintiff raises two contentions that apply to the City and County only.

Inasmuch as they are not parties to this appeal, we have no jurisdiction to consider these contentions. (Polster, Inc. v. Swing, supra, 164 Cal. App. 3d at p. 436.)

Finally, plaintiff contends defendant's brief has misrepresented the key point in his lawsuit. It is not based solely upon the right of an individual to abate a public nuisance based on injury to real property. Rather, it is brought as a public interest lawsuit [*14] as a private attorney general to abate a public nuisance which affects the entire nation. Again, we disagree.

DISCUSSION

Standard of Review

As in the previous appeal, we are reviewing a dismissal following the sustaining of defendant's demurrer without leave to amend. The only question before us is whether the trial court properly sustained the demurrer and denied leave to amend.

A demurrer tests the sufficiency of the plaintiff's complaint, *i.e.*, whether it states facts sufficient to constitute a cause of action upon which relief may be based. (Code Civ. Proc., § 430.10, subd. (e); *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 841-842.) In determining whether the complaint states facts sufficient to constitute a cause of action, the trial court may consider all material facts pleaded in the complaint and those arising by reasonable implication therefrom; it may not consider contentions, deductions or conclusions of fact or law. *(Moore v. Conliffe* (1994) 7 Cal.4th 634, 638; *Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

The trial [*15] court also may consider matters of which it may take judicial notice. (Code Civ. Proc., § 430.30, subd. (a); City of *Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459.) However, it may not consider in making its ruling the available evidence, the plaintiff's ability to prove the allegations in the complaint or other extrinsic matters. (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 922, 216 Cal. Rptr. 345; see *City of Atascadero, supra*, at p. 459.)

A demurrer should not be sustained without leave to amend

if the complaint, liberally construed, can state a cause of action under any theory or if there is a reasonable possibility the defect can be cured by amendment. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967; *Jager v. County of Alameda* (1992) 8 Cal.App.4th 294, 297.) The demurrer should be sustained and leave to amend denied only "where the facts are not in dispute, and the nature of the plaintiff's claim is clear, but, under the substantive law, no liability exists. Obviously no amendment would change the result." [*16] (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 946, p. 403; accord, *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra*, 68 Cal.App.4th at p. 459.)

On appeal, we review the trial court's sustaining of a demurrer without leave to amend de novo, exercising our independent judgment as to whether a cause of action has been stated as a matter of law and applying the abuse of discretion standard in reviewing the trial court's denial of leave to amend. (*Montclair Parkowners Assn. v. City of Montclair, supra*, 76 Cal.App.4th at p. 790; *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497-1498.) Plaintiff bears the burden of proving the trial court erred in sustaining the demurrer or abused its discretion in denying leave to amend. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra*, 68 Cal.App.4th at p. 459; *Coutin v. Lucas* (1990) 220 Cal. App. 3d 1016, 1020, 270 Cal. Rptr. 93.)

Analysis

Defendant demurred on four separate grounds: the complaint fails to state a cause of action against [*17] defendant for abatement of a public nuisance, it fails to state a cause of action against it for unlawful business practices, plaintiff lacks standing to bring the action, and the complaint is uncertain, ambiguous and unintelligible.

The trial court sustained the demurrer without leave to amend on all of these grounds.

A nuisance is, among other things, "anything which is . . indecent or offensive to the senses." (Civ. Code, § 3479.) "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Id., § 3480.)

There are three remedies for a public nuisance: an indictment or information, a civil action or abatement. (Civ. Code, § 3491.) An indictment or information, of course, may be brought by public authorities only. An action for abatement may be brought "by any public body or officer authorized thereto by law." (Id., § 3494; *People ex rel. Busch v. Projection Room Theater* (1976) 17 Cal.3d 42, 55-56, 130 Cal.Rptr. 328.) "A private person may maintain [*18] an action for a public nuisance, if it is specially injurious to himself, but not otherwise."(Id., § 3493.)

Plaintiff did not allege, nor does he claim that he can allege, that defendant's actions were "specially injurious to himself" (Civ. Code, § 3493), *i.e.*, that they injured him in some manner other than that in which they injured the general public *(Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1040). He therefore cannot state a cause of action for public nuisance.

Plaintiff claims to have standing to bring this action for public nuisance on behalf of the public as a private attorney general under Code of Civil Procedure section 1021.5, *People v. E.W.A.P., Inc.* (1980) 106 Cal. App. 3d 315, 165 Cal. Rptr. 73, and *People ex rel Busch v. Projection Room Theater, supra*, 17 Cal.3d 42. Code of Civil Procedure section 1021.5 permits a court to "award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right [*19] affecting the public interest." It does not, by its terms, confer standing on an individual to bring a civil action to enforce important rights affecting the public interest where standing otherwise does not exist.

People v. E.W.A.P., Inc., supra, involved an action by the Los Angeles City Attorney. (106 Cal. App. 3d at p. 317, fn. 2.) *People ex rel Busch v. Projection Room Theater, supra*, similarly was brought by the Los Angeles County District Attorney and other law enforcement officers. (17 Cal.3d at p. 47.) Neither decision confers standing on a private individual to bring an action on behalf of the public as a private attorney general when governmental officials, who alone have standing to bring such an action, decline to bring the action.

In sum, none of the authorities cited by plaintiff support his claim that he has standing to bring this action as a private attorney general.

Absent standing as an individual or as a private attorney general, he cannot state a cause of action based upon public nuisance. (*Cf. Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297, 314-315.)

In order to [*20] state a cause of action for unfair competition, a plaintiff must plead an "unlawful, unfair or fraudulent business act or practice," "unfair, deceptive, untrue or misleading advertising," or a violation of section 17500 et seq. of the Business and Professions Code (Bus. & Prof. Code, § 17200; see *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 383) which is likely to deceive members of the public (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267).

Plaintiff makes no allegation that members of the public were likely to be deceived by defendant's business practices. To the contrary, he alleges that he paid defendant $ 11.95 for "In Demand, Pay Per View, Adults Only" programs, and he received five adult motion pictures and additional previews. He does not claim to be able to allege a likelihood of public deception. He therefore has not stated, and cannot state, a cause of action for unfair competition. (Ibid.)

Inasmuch as plaintiff failed to state a cause of action against defendant and makes no showing that he could amend his complaint

to do so, the trial court [*21] properly sustained defendant's demurrer without leave to amend and dismissed the action. (*Aubry v. Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at p. 967; *Jager v. County of Alameda*, *supra*, 8 Cal.App.4th at p. 297.) We need not address the remainder of plaintiff's contentions. They are not relevant to our resolution of the issues on appeal.

The order is affirmed.

SPENCER, P.J.

We concur:

ORTEGA, J.
MALLANO, J.

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APPENDIX D

THE OPINION OF THE CALIFORNIA COURT OF APPEAL IN B171529, 2004 Cal. App. Unpub. LEXIS 7998 (August 31, 2004, filed)

(Reference: *Petition for A Writ of Certiorari*, page 2.)

JAMES J. CLANCY, Plaintiff and Appellant, v. COMCAST CORPORATION et al., Defendants and Respondents.

B171529

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

2004 Cal. App. Unpub. LEXIS 7998

August 31, 2004, Filed

NOTICE: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

PRIOR HISTORY: APPEAL from orders of the Superior Court of Los Angeles County, No. LC062475. Michael B. Harwin, Judge.

DISPOSITION: Affirmed in part and dismissed in part.

COUNSEL: James J. Clancy, in pro. per., for Plaintiff and Appellant; Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria and Paul J. Cambria, Jr.; Labowe, Labowe & Hoffman and Mark S. Hoffman for Defendants and Respondents.

JUDGES: SPENCER, P.J. We concur: ORTEGA, J. MALLANO, J.

OPINION BY: SPENCER

OPINION:

INTRODUCTION

Plaintiff James J. Clancy purports to appeal from an order sustaining without leave to amend the demurrers of defendants Comcast Corporation and Comcast of California VII, Inc., denying his request to strike defendants' demurrer, denying his request to examine his time and motion studies and refusing to make specific findings of fact and conclusions of law as to whether he had pleaded standing [*2] to bring this action.

He also purports to appeal from an order denying his motion for reconsideration.

The order sustaining defendants' demurrer without leave to amend is not appealable. (Code Civ. Proc., § 904.1; *Hill v. City of Long Beach* (1995), 33 Cal.App.4th 1684, 1695; *Yancey v. Fink* (1991) 226 Cal. App. 3d 1334, 1342, 277 Cal. Rptr. 415.) An appeal may be taken only from the subsequent order or judgment of dismissal. (Hill, supra, at p. 1695; *Yancey, supra,* at p. 1342.) We deem plaintiff's appeal to have been taken from the subsequent order of dismissal.

An order denying reconsideration is not appealable. (Code Civ. Proc. § 904.1; *Estate of Simoncini* (1991) 229 Cal. App. 3d 881, 891, 280 Cal. Rptr. 393; *Rojes v. Riverside General Hospital* (1988) 203 Cal. App. 3d 1151, 1160, 250 Cal. Rptr. 435, disapproved on other grounds in *Passavanti v. Williams* (1990) 225 Cal. App. 3d 1602, 1605, 275 Cal. Rptr. 887.) Insofar as plaintiff purports to appeal from this nonappealable order, his appeal must be dismissed. (*Rossi v. Caire* (1922) 189 Cal. 507, 508; [*3] Lavrischeff v. Blumer (1978) 77 Cal. App. 3d 406, 410, 143 Cal. Rptr. 567.)

This is plaintiff's third appeal in this action. He previously appealed from dismissals in favor of the other defendants in this action, following the sustaining of their demurrers without leave to amend. In his first appeal, we affirmed those orders of dismissal. (*Clancy v. The Hot Network* (Jan. 29, 2004, B166374) [nonpub.

opn.].) The Supreme Court denied review of our decision on April 14, 2004, S123214. In the second appeal (*Clancy v. AT&T Corp.*, B168827) and this appeal, which we are considering concurrently, we again affirm the orders of dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

The facts and the majority of the procedural background pertinent to this appeal are set forth in the opinion on plaintiff's second appeal, *Clancy v. AT&T Corp.*, *supra*, B168827, at pages 2 through 6. We need not repeat them here. The additional procedural background leading up to this appeal is set forth below:

After being named as Doe defendants, Comcast Corporation and Comcast of California VII, Inc. (collectively Comcast) filed a demurrer to plaintiff's complaint. The grounds [*4] were the same as those on which AT&T filed its demurrer: plaintiff failed to state causes of action against it for abatement of a public nuisance or for violation of Business and Professions Code section 17200, plaintiff lacked standing to bring the action and his entire complaint was uncertain, ambiguous and unintelligible. Plaintiff opposed the demurrer and moved to strike it on the ground it rested on fraudulent misrepresentations of fact and law. The trial court denied the motion to strike and sustained the demurrer without leave to amend. Thereafter, it dismissed the action as to Comcast.

Plaintiff moved for reconsideration of the trial court's rulings under Code of Civil Procedure section 1008, claiming "new facts were uncovered upon completion of the scheduled hearing, which were not previously available to Plaintiff at the start of the hearing with respect to the duty of the Trial Court, under the Doctrine of Separation of Powers to support, where possible, the State and Federal Obscenity Statutes enacted by the California State Legislature, and the U.S. Congress, and their application as a means of judicially abating [*5] Moral Public Nuisances." The trial court denied this motion.

DISCUSSION

In his brief, plaintiff sets forth the same 10 contentions that he raised in his second appeal. As we state in our opinion on that appeal, to the extent plaintiff is attempting to have us vacate our previous opinion and reconsider the issues he raised at that time, we are without jurisdiction to do so. (*Clancy v. AT&T Corp., supra*, B168827, at pp. 6-7.) We also have no jurisdiction to consider orders from which this appeal was not taken and defendants who are not parties to this appeal. (Id. at p. 7.) Plaintiff also raises a number of contentions that we need not address, in that they are not necessary to our resolution of this appeal. (Id. at pp. 7-8, 12.)

The question before us is whether the trial court properly sustained the demurrer and denied leave to amend. (*Clancy v. AT&T Corp., supra*, B168827, at p. 8.) We must determine whether plaintiff's complaint states facts sufficient to constitute a cause of action upon which relief may be based (Code Civ. Proc., § 430.10, subd. (e); *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 841-842) [*6] or whether
it can be amended to do so (Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 967; Jager v. County of Alameda (1992) 8 Cal.App.4th 294, 297). Plaintiff bears the burden of proving the trial court erred in sustaining the demurrer or abused its discretion in denying leave to amend. (City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1998) 68 Cal.App.4th 445, 459; Coutin v. Lucas (1990) 220 Cal. App. 3d 1016, 1020, 270 Cal. Rptr. 93.)
As we explain in our opinion in plaintiff's second appeal, plaintiff cannot state a cause of action as a private individual to bring an action to abate a public nuisance. (*Clancy v. AT&T Corp., supra*, B168827, at pp. 10-11, citing Civ. Code, §§ 3491, 3494; *People ex rel. Busch v. Projection Room Theater* (1976) 17 Cal.3d 42, 55-56, 130 Cal. Rptr. 328; *Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1040.) Code of Civil Procedure section 1021.5, *People v. E.W.A.P., Inc.* (1980) 106 Cal. App. 3d 315, 165 Cal.Rptr. 73, [*7] and *People ex rel. Busch v. Projection Room Theater*, supra, 17 Cal.3d 42 do not confer

standing on plaintiff to bring such an action as a private attorney general. (*Clancy v. AT&T Corp., supra*, B168827, at pp. 10-11.) Plaintiff has not demonstrated that he can state a cause of action to abate a public nuisance. (*Ibid.*)

We also explain that plaintiff has not demonstrated that he can state a cause of action for unfair competition. (*Clancy v. AT&T Corp., supra*, B168827, at pp. 11-12.) He does not claim to be able to allege the requisite likelihood of public deception to state such a cause of action. (*Ibid.*, citing *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267.)

Plaintiff has presented nothing in his briefs on this third appeal which dictates any different result with respect to Comcast. Inasmuch as plaintiff failed to state a cause of action against Comcast and makes no showing that he could amend his complaint to state a cause of action, the trial court properly sustained Comcast's demurrer without leave to amend and dismissed the action. (*Aubry v. Tri-City Hospital Dist., supra*, 2 Cal.4th at p. 967; [*8] *Jager v. County of Alameda, supra*, 8 Cal.App.4th at p. 297.)

The order of dismissal is affirmed. The appeal from the order denying reconsideration is dismissed. Defendants are to recover costs on appeal.

SPENCER, P.J.

We concur:

ORTEGA, J
MALLANO, J.

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Supreme Court, U.S.
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No. 04-1205

IN THE

Supreme Court of the United States

JAMES J. CLANCY, acting as a
Private Attorney General and for himself,

Petitioner,

v.

A.T.& T. CORP., a New York Corporation; COMCAST CORP., a Pennsylvania Corporation; and COMCAST OF CALIFORNIA VII, INC., a Washington Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION ONE

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the California Court of Appeal err in sustaining respondents' demurrers and dismissing petitioner's complaint on its face, without leave to replead, where petitioner lacked standing to allege his California state law claims, and failed to state any cognizable cause of action under applicable state law?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent A.T.&T. Corp. has no parent corporation, and no public company owns 10% or more of its stock.

Respondent Comcast Corporation has no parent corporation, and no public company owns 10% or more of its stock. Respondent Comcast Corporation is the parent company of Respondent Comcast of California VII, Inc.; no public company (other than Comcast Corporation) owns 10% or more of the stock of Comcast of California VII, Inc.

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Respondents respectfully submit this brief in opposition to the petition for a writ of certiorari to review the decisions of the California Court of Appeal, Second Appellate District, Division One, affirming the trial court's sustaining of respondents' demurrers and dismissing this action on the face of the pleadings, without leave to replead.

STATEMENT OF THE CASE

Petitioner James J. Clancy ["Clancy"] is a California attorney who claims to have 38 years of experience specializing in obscenity litigation. Living in the Los Angeles area, he formerly received cable television service from Respondent A.T.&T. Corp. ["AT&T"]. However, due to a purchase of assets, Petitioner's current franchised cablecaster is Respondent Comcast of California VII, Inc., whose parent company is Respondent Comcast Corporation.

The cable broadcasts which are available to Petitioner include adult-themed, sexually oriented motion pictures of a highly graphic nature. In order to receive such cable broadcasts, however, in addition to paying a fee for the underlying cable television services, Petitioner is also required to pay an additional pay-per-view fee as a premium charge.[1] As relevant, the additional cable charge to petitioner Clancy was $11.95 per three-hour segment of broadcasts (C-2). As set forth by the Court of Appeal, during 2001 Petitioner voluntarily recorded some 460 adult motion pictures broadcast by AT&T, including 121 separate film titles (C-3).

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[1] The underlying facts are stated in one of the Opinions of the California Court of Appeal appealed from, case no. B168827, annexed to the petition as Appendix "C."

Petitioner Clancy made numerous attempts to persuade Los Angles City and County officials to stop the cable broadcast of sexually explicit motion pictures by Playboy Enterprises, Inc. through its cable television broadcast channels (The Hot Network and The Hot Zone) as a public nuisance. When the government officials declined to take legal action to abate the cablecasts, Petitioner commenced the instant lawsuit in Los Angeles Superior Court on October 4, 2002, filing it in his own name as a "private attorney general" pursuant to California law (C-4). Petitioner's 88-page complaint, with numerous exhibits, essentially contended that the adult motion pictures broadcast by AT&T[2] were obscene per se moral public nuisances and contraband. Petitioner sought a ruling, in part, that AT&T (and subsequently Comcast) should be ordered to cease its cablecast of "hardcore pornography" to consenting adult viewers, and cancellation of the cable television broadcast franchise. In addition to the cablecasters, Petitioner initially named as defendants Vivid Video, Inc. and Vivid Entertainment Group for supplying the alleged pornographic videos, several Playboy entities for owning the adult cable television networks broadcasting the subject videos, and various Los Angeles City and County officials for failing to abate the "pornographic" cablecasts (C-4, C-5).

All defendants filed demurrers to the complaint, asserting *inter alia* that Petitioner lacked standing to assert a public nuisance since he was not specially damaged; that Petitioner failed to state a cause of action for unfair business practices under California Business and Professions Code Section

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[2] AT&T's cable television broadcast interest in the Los Angeles area was subsequently acquired by Respondent Comcast of California VII, Inc., whose parent is Respondent Comcast Corporation [collectively "Comcast"].

17200 *et seq.*; and that the entire complaint was unintelligible. Petitioner also sought (by mandamus) to require the trial court to view several adult videos which he had attached as exhibits.

Ultimately, over several different proceedings, the trial court sustained all demurrers by the various defendants, without leave to replead. The California intermediate appellate court, the Court of Appeal, Second Appellate District, Division One, affirmed the demurrers and the dismissal of Petitioner's complaint against all defendants without leave to replead, in three separate proceedings. Copies of the Court of Appeal's Opinions in the actions against Respondents AT&T and Comcast affirming the dismissals are respectively annexed to the petition as Appendices "C" and "D."

Thereafter, Petitioner unsuccessfully sought leave to appeal to the California Supreme Court in all three instances. The California High Court's denial of leave as to Respondents AT&T and Comcast are respectively annexed to the Petition as Appendices "A" and "B." Petitioner has also made various requests for rehearing to the California Court of Appeal as well, but these have been denied (petition p.2).

Petitioner now brings his instant petition for certiorari to this Court with regard to the decisions of the California Court of Appeal as to Respondents AT&T Corp. and Comcast. Petitioner did not seek certiorari of the Court of Appeal's affirmance of the trial court's sustaining of the demurrers dismissing the complaint as against the Vivid defendants, the Playboy entities, or Los Angeles officials.[3]

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[3] The California Supreme Court's denial of leave to appeal to Mr. Clancy on the first Court of Appeal's affirmance of the demurrer to his complaint is referenced at D-3.

REASONS FOR DENYING THE PETITION

I. Petitioner Has Failed To State A Claim For Relief.

The general reasons for granting certiorari by this Court are contained in Rule 10 of the Supreme Court Rules. As set forth therein, certiorari is typically granted where: (a) there is a conflict in decisions among the United States Courts of Appeals on the same important matter, or a court of appeals has decided a case in conflict with a state supreme court; (b) a state court of last resort has decided an important federal question in a manner conflicting with the decision of a state high court or United States court of appeals; or (c) a state court or United States Court of Appeals has decided an important question of federal law that has not been, but should be settled by this Court, or in conflict with a decision of this Court. None of the above factors are even remotely present in the instant case.

Here, the decisions below by a California intermediate court broke no new ground. There are no United States Court of Appeals decisions of relevance; there is no decision on point of the California Supreme Court, let alone that of any other state high court; and there is no important unsettled question of law to be decided by this Court, or a decision contrary to the governing cases of this Court. Rather, a state intermediate level court has decided issues based strictly in local state law. Moreover, since this matter involves a dismissal on the pleadings, there is no full record to review.

Even assuming, arguendo, that the adult motion pictures being cablecast in the Los Angles area by the respondents are "obscene" under contemporary community standards within the meaning of *Miller v. California*, 413 U.S.15

(1973), any substantive rights in favor of Petitioner would depend on California law.

Here, Petitioner has attempted to assert a claim for a moral public nuisance. Under California Civil Code § 3480, a public nuisance is one which affects an entire community or neighborhood or a large number of persons, through annoyance or damage inflicted upon individuals. However, under California law, a private person may only maintain an action for a public nuisance if it is specially injurious to himself. California Civil Code § 3493. Petitioner did not allege or claim that Respondents' actions especially injured him under § 3493 in some manner other than that in which the purported injury was caused to the general public, *Koll-Irvine Center Properties v. County of Orange* (1994) 24 Cal.App.4th 1036, 1040, 29 Cal.Rptr.2d 664, 666, and thus he has no viable private action for a public nuisance (C-12).

Cases cited by Petitioner in support of his standing to sue for a public nuisance are inapposite, since they involve governmental attorneys expressly granted the right to bring an action to abate a nuisance under California law. Thus, *People v. E.W.A.P., Inc.* (1980) 106 Cal.App.3rd 315, 165 Cal.Rptr. 73 [petition, pp.5,7] involved an action by the Los Angles City Attorney (C-13); *People ex rel Busch v. Projection Room Theater* (1976) 17 Cal.3d 42, 130 Cal.Rptr. 328 [petition, pp.6,13], involved an action brought by the Los Angles County District Attorney and other law enforcement officers (*Id.*). As stated by the California Court of Appeal, neither decision confers standing on private individuals to bring an action on behalf of the public as a private attorney general when government officials, who would have such standing, decline to bring the action (C-13). Thus, the court below properly found that the Petitioner lacked standing to bring this action.

Petitioner's other principal claim is pursuant to the California Unfair Competition Law, codified in Business and Professions Code § 17200, *et seq*. That California statute formerly afforded standing to private plaintiffs who had not suffered any special injury, to bring an action against alleged unfair or unlawful business practices as a private attorney general for injunctive relief and attorney's fees.[4] However, in the instant matter, there has been no unfair or deceptive practice affecting members of the public, as would be required for such a claim. *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267, 10 Cal.Rptr. 2d 538.

Here, as noted by the Court of Appeal, Petitioner has not alleged that members of the public were likely to be deceived by Respondents' business practices. Rather, Petitioner himself alleges that he paid Respondent AT&T premium charges of $11.95 for various pay-per-view, adults-only programs at his own request. Thus, Petitioner could not state a cause of action under the California Unfair Business Practices Act (C-13). Moreover, the cable television industry is highly regulated by both local authorities and the Federal Communications Commission. It may be noted that while Petitioner Clancy complains of a public nuisance as to the cable broadcasts, the subject videos are not sent over the free pubic airwaves. Rather, they are broadcast on a premium cable television network on a pay-per-view basis. Thus, any viewing of the sexually explicit films in question is strictly on a voluntary basis. Apparently Petitioner Clancy has taped

[4] The relevant statutory provisions, California Business and Professions Code §§ 17203, 17204 were modified by the voters of California in the election of November 2, 2004. The current provisions now specifically limit actions by private attorney generals to "any person who has suffered *injury in fact* and has lost money or property as a result of such unfair competition." (Emphasis added.)

hundreds of hours of sexually explicit videos just so that he can complain about them.

In addition, this is not a case presenting an important issue of federal law with significant practical consequences, for which certiorari is sometimes granted, Supreme Court Rule 10(c). Given the recent November, 2004 amendment to the California Unfair Competition Law, it is no longer possible for persons who have voluntarily subjected themselves to a purported injury, such as Petitioner Clancy, to even bring such claims under California law.

II. Petitioner's Claim Is Foreclosed By *Lawrence v. Texas*

The essence of Petitioner Clancy's claim is that the adult motion pictures cablecast by AT&T (now Comcast) are so "pornographic," that they offend public morality and are therefore a public nuisance to be proscribed by law. However, that argument has been foreclosed by this Court's recent decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), striking down Texas' anti-sodomy criminal laws preventing private homosexual conduct. In *Lawrence*, this Court expressly rejected the argument of the State of Texas that the legislature considered such conduct to be immoral and subject to being proscribed. Instead, this Court ruled that public morality was not sufficient to even provide a rational basis to sustain the Texas sodomy law concerning private sexual conduct between consenting adults. Not surprisingly, Petitioner utterly ignores *Lawrence* in his petition.

In *Lawrence*, this Court, following its line of cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965) [contraception rights]; *Eisenstadt v. Baird*, 405 U.S. 438 (1972) [contraception]; and *Loving v. Virginia*, 388 U.S. 1

(1967) [marriage], upheld the liberty interest right of consenting adults to engage in homosexual acts in the privacy of their own home. Here, Respondents' cable broadcasts are sent into the private homes of subscribers who willingly pay a premium pay-per-view fee – such as Petitioner. Under *Lawrence*, public morality is no longer a legitimate state interest to justify infringing on such private, consensual conduct. Moreover, the viewing of cablecasts of sexually explicit motion pictures does not even involve direct sexual activity, such as upheld in *Lawrence*.

CONCLUSION

Certiorari is not warranted in this case. The California Court of Appeal's analysis of California law and affirming dismissal of Petitioner's complaint was correct, and the State Supreme Court denied three separate petitions for review. Petitioner Clancy has no standing to bring a claim under California law for public nuisance, or under the State Unfair Competition Law. Under the latter statute as amended, Clancy would no longer have standing to bring a case such as the instant proceeding in California, since his voluntary actions caused him no legal injury. Moreover, Petitioner's complaining of immorality and failure of the government to enforce public morality is not a valid basis for governmental regulation here in light of *Lawrence v. Texas*.

In sum, there is no conflict of decisions among the United States Courts of Appeals or state high courts, and no important federal question of law has been presented.

The petition for certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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NO. 04-1205

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

JAMES J. CLANCY, acting as a Private Attorney General and for himself,
PETITIONER

v.

A.T.&T. CORP., a New York Corporation; **COMCAST CORP.**, a Pennsylvania Corporation; and **COMCAST OF CALIFORNIA VII, INC.**, a Washington Corporation,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE

PETITIONER'S REPLY MEMORANDUM

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MAY 5, 2005

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

No. 04-1205

JAMES J. CLANCY, acting as a Private Attorney General and for himself,
PETITIONER

v.

A.T.&T. CORP., a New York Corporation; COMCAST CORP., a Pennsylvania Corporation; and COMCAST OF CALIFORNIA VII, INC., a Washington Corporation, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION 1.

PETITIONER'S REPLY MEMORANDUM

Petitioner respectfully submits this Memorandum in response to the Opposing Brief jointly filed by Respondent AT&T Corp. (hereinafter referred to as "Cable TV Operator AT&T") and Respondents Comcast Corp. and Comcast of California (hereinafter collectively referred to as "Cable TV Operator Comcast").

I. INTRODUCTION

The Petition seeks review of federal law issues arising in connection with *two* separate but related state appeals (B 168827 and B 171529), which, as the Opposition notes, are related to a third appeal (B166374, involving demurrers filed by government officials and Cable TV Programmers). However, this Petition implicates federal law issues

that are distinct from those presented in B166374, because the instant cases (B168827and B171529) [1] examine the legal obligations of Cable TV Operators under both state and federal law with respect to the transmission of *obscene* Cable TV programming. [2]

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[1]The Opposition incorrectly asserts, at p. 4, that there is "*no full record to review*." This statement is without support. In all three related appeals, Petitioner's Complaint was wrongfully dismissed *at the pleading stage, without leave to amend*. Even though the wrongful orders of dismissal *obviously prevented trial of the issues*, an "adequate" record exists for this Court to examine and decide the important procedural and substantive federal issues presented by the Petition. The record available in the related appeals (B166374, B168827, and B171529) conforms with California Rules of Court, Rule 10, which specifies that only one record need be prepared if more than one appeal is taken from a related order.

In order to address any concern that the Opposition may have raised with respect to the "adequacy" of the record, Petitioner is submitting the following: the Exhibits which were filed with the Trial Court, the Court of Appeal, and the California Supreme Court are being "Express Mailed" to the Clerk of this Court. In addition, ten (10) copies of the written "Record" is included in said shipment: nine copies for Members of the Court (one for each Justice), and 1 for the Clerk.

[2]The Opposition essentially frames a specific Question of Law for this Court to consider:

> Is the Cable TV programming alleged by the Complaint to be *obscene* merely so-called "Adult Material", or is said Cable TV programming *"per se" obscene* (on its face as a "Matter of Law"), and therefore *illegal to transmit over Cable TV*?

With respect to this Question, the facts pleaded in the Complaint mandate the conclusion that the Cable TV programming is *per se obscene*, and therefore presents the following issue:

> "Was Associate Justice Roy Herndon correct when he dissented in *Harmer v. Tonylyn Productions, et al. (The Motion Picture Film "Without A Stitch")*, 23 Cal.App.3d 941, at 946-948, App., 100 Cal.Rptr. 576 at 579 (C.A.2d. Div. 1, 1972), *rehearing den.* March 30, 1972, *hearing den.* April 26, 1972."

It is clear that Justice Herndon's position was subsequently vindicated by:

(1) *Paris Adult Theatre* [see *Paris Adult Theatre I, et al. v. Slaton*, 413 U.S. 49 (1973) (exhibition of *obscene* materials to a "consenting adult audience" is not protected by the First Amendment); and

(2) *Bloom v. California*, 16 Cal.3d 71 (1976) (upholding as Constitutional California Penal Code 311.2 (the state *obscenity* crime); deciding that the State of California has a governmental interest in regulating "public commerce" and the "commercial" distribution of obscene material, citing *Paris Adult Theatre*; and holding that the public reach of the statutes of California goes as far as the

This Court is under a Constitutional duty to ultimately decide whether the Cable TV Programming, alleged to be *obscene per se* and a *per se public nuisance* [3], is *obsene* [4],

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Constitution will permit and restrains obscenity from the flow of public intrastate commerce), and

(3) the *Busch* case [see *People ex rel. Busch v. Projection Room Theater, et al.*, 17 Cal.3d 42 (1976); *People ex rel. Busch v. Projection Room Theater, et al.*, 16 Cal.3d 350 (decided March 4, 1976, and vacated June 1, 1976); and *Busch et al. v. Projection Room Theater, et al.*, 44 Cal. App.3d 56 (1974) (under California law the exhibition of obscenity is a public nuisance, in which "harm" is presumed, and does not have to be "proved")].

Respondent Cable TV Operators, in soliciting and accepting orders for "pay-for-view" products, have implicitly represented that they sell "lawful" Cable TV programming. Any Cable TV customer (such as Petitioner) who, in response to Respondents false representations (see *infra*, at footnote 6), ordered, paid for, and received *obscene* Cable TV programming has suffered "special injury" or "injury in fact", and must be deemed to have "lost money or property" as a result of Respondents' *illegal* business practices, *because they did not get what they ordered (i.e. lawful programming)*. This rebuts the points raised in the Opposition regarding the need to prove either "special injury" (at p. 5) in order to maintain a nuisance action, or "injury in fact" and "lost money or property" occurring as a result of Respondents' acts of unfair competition (at p. 6).

[3] See *Black's Law Dictionary* (Seventh Ed.) (West Group, St. Paul, Minn., 1999), at page 1094: "**nuisance per se.** Interference so severe that it would constitute a nuisance under any circumstances; a nuisance regardless of location or circumstances of use. . . .Also termed *nuisance at law; absolute nuisance.*" See also p. 1095: "**public nuisance.** An unreasonable interference with a right common to the general public, such as a condition dangerous to health, offensive to community moral standards, or unlawfully obstructing the public in the free use of public property. Such a nuisance may lead to a civil injunction or criminal prosecution. – Also termed *common nuisance.*"

[4] The Complaint states causes of action for declaratory judgment, injunction, nuisance, as well as for *unlawful* business practices under California Business and Professions Code §17200 *et seq.*, California's unfair competition law, or "UCL." The UCL prohibits five separate and distinct types of wrongful conduct, each of which stands separately:

(1) "unlawful business act or practice" [The Complaint's allegations of violations of underlying *obscenity* laws constitute a *per se* violation of § 17200. *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 950 (2002); *Cel-Tech Communications, Inv. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163 (1999). Virtually any law or regulation – federal or state, statutory or common law– can serve as predicate for a § 17200 "unlawful" violation. *People v. E.W.A.P., Inc.*, 106 Cal.App.3d 315, 319

(1980)(involving underlying violations of state *obscenity* law). § 17200 "borrows" violations of other laws and treats them as unlawful practices independently actionable under § 17200. *Farmers Ins. Exch. v. Sup. Ct.*, 2 Cal.4th 377, 383 (1992). Business practices that violate federal laws may be redressed under § 17200. *Diaz v. Kay-Dix Ranch*, 9 Cal.App.3d 588, 591 (1970).];

(2) "unfair business act or practice"(which, unlike the first prong, uses "likelihood of deception" test);

(3) "fraudulent business act or practice"(which, unlike the first prong, uses a "likelihood of deception" test);

(4) "unfair, deceptive, untrue or misleading advertising";

(5) "any act prohibited by Bus. & Prof. C. §§ 17500-17577.5.

See William L. Stern, *Bus. And Prof. Code § 17200 Practice* (The Rutter Group, 2005), at pp. 3-2 through 3-3, Paragraph 3:14-3:15. The Opposition, at p. 6, is legally incorrect when it argues that in order to state a cause of action, the UCL requires that there be an "unfair or deceptive practice affecting members of the public." Petitioner's Complaint states a UCL action under prong 1, because it alleges "illegal" and "unlawful" acts and practices, although the Complaint also alleges "unfair" or "deceptive" practices (see discussion, *supra*, at footnote 2).

The Opposition correctly notes, at p. 6, that at the time the Complaint was filed (October 2002), the UCL "afforded standing to private plaintiffs who had not suffered any injury, to bring an action against alleged unfair or unlawful business practices as a private attorney general for injunctive relief and attorney's fees." A private plaintiff may bring a UCL action even when "the conduct alleged to constitute unfair competition violates a statute for the direct enforcement of which there is no private right of action." (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal. 4th 553, 565 [71 Cal. Rptr. 2d 731, 950 P.2d 1086].) The UCL was subsequently modified by Proposition 64, which took effect on November 3, 2004, but did not address whether it was applicable to cases filed before its effective date. Prop. 64 sought to curtail some "private attorneys" who filed "frivolous lawsuits as a means of generating attorneys' fees without creating a corresponding public benefit"... "where no client has been injured in fact" or where clients "have not used the defendant's product or services," or who "filed lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision." See Prop. 64, § 1(b),(b)(1-4).

The motivation and reasons expressing why Prop. 64 was thought necessary by its proponents, in effect, proves how *easy* it was to state a ULC cause of action when Petitioner filed his Complaint, and further proves that the Second and Third Questions propounded by the Petition must be answered in the affirmative. Questions 2 and 3 concern the Constitutional sufficiency of the California state court's review of Petitioner's Complaint, and are "date specific" regarding the point of time at which Petitioner suffered a loss of Constitutional rights because of the improper procedures employed by the state court (*i.e.* which occurred on the day the Court Constitutionally erred by dismissing the Complaint without reviewing it in its

or whether it is *merely* some type of "Adult Material" [5/] falling outside

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entirety, see discussion, *infra*, at footnote 7 and accompanying text). Because these Questions present deprivations of fundamental Constitutional Rights that *ripened and are now fully actionable regardless of Prop. 64*, resolution of these Questions are not dependent upon whether or not Prop. 64 is "retroactive." However, the Complaint complies with Prop. 64, which limits representative actions to "any person who has suffered injury in fact and has lost money or property as a result of such unfair competition," because *the Complaint pleads facts indicating that Petitioner has suffered the requisite "injury in fact" and has "lost money" as a result of Respondent's offending conduct* (see discussion, *supra*, at footnote 2). In addition, the Complaint preserves Petitioner's right to proceed with a representative action under Prop. 64, because the Complaint (at Paragraph 80) asserts "Plaintiff has a right to file a "class action" on behalf of other paying subscribers and non-subscribers, pursuant to C.C.P. § 382. . . ." This complies with the provisions of Prop. 64 (*i.e.* "any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of § 17204 and complies with Section 382 of the Code of Civil Procedure.")

[5/] In a civil context, as distinguished from a "criminal law" context, there is a sharp distinction in the treatment between Cable TV programming that is "*per se obscene*", and programming that is "*non-obscene*" (so-called "Adult Material"). "*Per se obscene*" programming is not protected by the First Amendment, and is banned from being transmitted *via* Cable TV under federal law, and this Court must make a decision on that matter. See, *supra*, at footnote 2. *Cf.*, *United States v. Playboy Entertainment Group, Inc.* , 529 U.S. 803, 829-830 (2000) (Justice Thomas, concurring):

> Where the programming at issue in the case is obscene as this Court defined the term in *Miller v. California*, 413 U.S. 15, 24 (1973), . . . the Government is empowered by statute to sanction these broadcasts with criminal penalties. See 47 U.S.C. § 559 (1994 ed., Supp. III) ("Whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined under title 18 or imprisoned not more than 2 years, or both").

The Opposition's invitation to this Court, at pp. 4-5, to evaluate the Petition by "assuming, *arguendo*, that the adult motion pictures being cablecast in the Los Angeles area by the respondents are 'obscene' under contemporary community standards within the meaning of *Miller v. California*, 413 U.S. 15 (1973)" has profound significance. If Respondents' conduct is: (1) deemed to violate state or federal *obscenity* law as a matter of fact, or (2) if it is *per se* "unlawful," as a matter of law, the Complaint would have to be reinstated, and Respondents would be subject to the Complaint's request for a declaratory judgment, injunction, or restitution, under either theory of declaratory judgment, nuisance or unfair competition as a matter of Law.

the prescriptions and control of federal law, as Respondent Cable TV Operators argued to the State Courts, and as the California Courts agreed and ultimately relied upon in dismissing Petitioner's Complaint without leave to amend. [6]

The Petition raises the question of whether it is Constitutionally permissible for a State Court to dismiss a Complaint "for failure to state a cause of action," without first having reviewed the Complaint *in its entirety* (that is, without reviewing the "Time and Motion Studies" and "videotapes" incorporated by reference within the Complaint, and thus without ever rendering an independent judgment concerning the true nature of the subject matter contested to be *obscene*.) [7]

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[6] See the May 14, 2003 Order Sustaining Defendant AT&T Corp.'s Demurrer Without Leave to Amend and Order of Dismissal, which stated that the demurrer was granted "for the reasons stated in AT&T Corp.'s moving papers," appearing as Document 59 of the Appendix in Lieu of Clerk's Transcript. AT&T's moving papers (appearing at Documents 46, 47, and 52) clearly misstated and seriously misconstrued federal Cable TV law, in order to shield the Cable TV Operator's *illegal* behavior.

The Comcast demurrer emphasized the issue of "standing" in its moving papers. See Point IV of Document 65 and Document 68 of the Appendix in Lieu of Clerk's Transcript. The Reporter's Transcript for September 3, 2003 reveals that the Trial Court's decision to sustain the Cable Operator's demurrer was not based upon the argument of "standing," but rather, was based upon failure to state a cause of action. See the Reporter's Transcript for September 3, 2003, stating, at page 13, lines 13-14:

> *"This is not a question of standing. I have ruled based upon the pleadings."*

Petitioner sought further clarification from the Court, at page 13, line 19:

> *"Are you holding that I do have standing?"*

To which the Court responded:

> *"No, I'm holding that I don't need to get to that. Thank you."*

[7] It was the duty of the California Courts, *at some stage*, to determine whether as a matter of law the Complaint's specifically identified subject matter was, or could be found to be, *obscene*. See *People v. Noroff*, 67 Cal.2d 791 (1967) [criminal proceedings]; that duty must now be exercised by this Court, see *Jenkins v. Georgia*, 418 U.S. 153 (1974) [post-judgment proceedings]. Because this is an *obscenity* case, the trial and appellate courts had a Constitutional *duty* to review the videotapes and time and motion studies, because they constituted part of the Complaint under the state procedure that permits an obscenity case plaintiff to "plead" such material as factual allegations "by incorporation." See *People ex rel. Busch v. Projection Room*

II. THE PETITION SHOULD BE GRANTED.

The California Courts cannot evade the controlling effect on the Complaint of: (1) *federal obscenity* laws that absolutely prohibit Cable TV Operators from transmitting *obscenity* over Cable TV, [1/] and (2) established state law precedent engrafting both substantive and procedural requirements that must be utilized in state *obscenity* cases. [2/] Contrary to what the Opposition asserts at p. 4, this Court is authorized and should grant certiorari in this case, because:

(1) The California State Courts have decided an important question of federal law that has not been, but should be settled by this Court: *Federal law* imposes *an absolute ban* on Cable TV Operators, prohibiting them from transmitting *obscene* Cable TV programming. Substantial violation of this federal law ban are serious federal matters. Respondent Cable TV Operators' failure to comply

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Theater, et al., 17 Cal.3d 42 (1976); *People ex rel. Busch v. Projection Room Theater, et al.*, 16 Cal.3d 350 (decided March 4, 1976, and vacated June 1, 1976); and *Busch et al. v. Projection Room Theater, et al.*, 44 Cal. App.3d 56 (1974).

The California Courts improperly denied Petitioner any meaningful exercise of his "right of access" to the courts, guaranteed to him by the laws of the State of California and of the United States, because they completely denied him any judicial forum in which to meaningfully litigate a legitimate dispute arising from his Cable TV provider's transmission of obscene Cable TV programming into his home. The Record below (see 2004 Cal. App. Unpub. LEXIS 925, pp. 17-19) demonstrates that the California Appellate Court refused to review the videotapes and time and motion studies, and also refused to direct that the trial court review said material, concluding:

> "The question before the trial court was whether plaintiff stated causes of action against the named defendants. If that question could be answered without reviewing the materials provided by plaintiff, we see no reason why the trial court should have been required to review them."

This improperly shielded the Cable TV Operators with absolute immunity, and wrongfully absolved the Cable TV Operators from all liability under federal and state law. Thus, State orders dismissing Petitioner's Complaint must be vacated by this Court, because they violate important federal law principles of due process, equal protection, federal and state *obscenity* law and substantive federal Cable TV law.

[1/] See 47 U.S.C. §§ 558-559, and 18 U.S.C. § 1468.

[2/] See discussion on controlling state law applicable to this case, *supra*, at footnotes 2, 3, 4, 5, 7, and 12.

with the federal obscenity laws is a matter of great import [10] (especially

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[10] Illegal business practices should not be rewarded by this Court. Currently there is no "cost" to Respondents for carrying obscene Cable TV programming – they have only monetary profits. Respondents have a heavy financial incentive to continue in their unlawful business practices. This is explained by Dennis McAlpine, an analyst at Auerbach, Pollak and Richardson, in a FRONTLINE "American Porn," 2001 interview, (visited 5/2/05 at 1:09 pm), available at: < http://www.pbs.org/wgbh/pages/frontline/shows/porn/interviews/mcalpine.html >. McAlpine offered an overview of the economics and business of the adult industry, including estimates of the revenue, as of 2001, that AT&T generated from distributing "adult" programming through its cable operations:

> McAlpine: "Typically, if you look at a cable company, they are charging the consumer $30 a month, and he's getting 50 channels or 100 channels or 200 channels. And they don't break it down from that. They have to pay a good portion of that in programming to the suppliers like CNN or Showtime, or whoever may be getting it.
>
> "The difference, when you get to the adult programming, is that New Frontier and Playboy supply the programming to the cable operator. *The cable operator receives money directly from it. He will keep 80 percent, 85 percent, 90 percent of that money for himself, and give the rest to the supplier. So for him, adult is a source of revenue, and it has no cost against it. He doesn't have to pay for the programming, but he receives the money from it. So for him, it's an incredibly profitable operation, particularly in terms of profit and margin.*" [Emphasis added.]

McAlpine stated that "the cable operator, in essence, has a monopoly on his subscriber. . . ." When asked how much would AT&T lose if it did not carry "adult" programming, McAlpine responded:

> McAlpine: *"If you look at how much money is coming in from adult, remember there's virtually no cost to AT&T for carrying it. And if he's generating $10 million, $20 million a month, that's virtually all 'found money' going into the bottom line.* So it can be a significant amount. Twenty million dollars times 12 months -- that's a lot of bread." [Emphasis added.]

Respondents are liable for violations of state consumer protection and false or misleading advertising laws, in spite of the fact that, as the Opposition notes at p. 6, the "cable television industry is highly regulated by both local authorities and the Federal Communications Commission." See *Texas v Synchronal Corp.*, 800 F.Supp. 1456 (WD Tex., 1992).

given the prominence of the Cable TV Operators involved [11]). The ultimate resolution of the nature of Respondents' business practices raised by the questions in the Petition are of National interest. [12]

(2) The California State Courts have decided an important question of federal law that is in conflict with several decisions of this Court. See *Paris Adult Theatre I, et al. v. Slaton*, 413 U.S. 49 (1973); *United States v. Orito*, 413 U.S. 139 (1973), at 141-143; *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123 (1973), at 126-129; *United States v. Thirty-seven Photographs*, 402 U.S. 363 (1971), at 376-377 (opinion of White, J.); *United States v. Reidel*, 402 U.S. 351 (1971); *cf. Rowan v. Post Office Dept.*, 387 U.S. 728 (1970). A sender's "right to distribute" material is not absolute. [13]

(3) The California trial and appellate courts (including the state court of last resort) have decided an important federal question in a manner conflicting with the decision of a state court: See *Nebraska v. Harrold*, 593 N.W.2d 299 (Neb. 1999), *certiorari denied* January 24, 2000, 2000 U.S. LEXIS 921 (holding that federal cable TV law does not block enforcement of state obscenity laws), and

(4) The California trial and appellate courts (including the state court of last resort) have decided an important federal

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[11]Respondent Cable TV Operators are the largest providers of Cable TV services in the Nation. See, for example, the PBS show FRONTLINE report entitled "American Porn," which investigates in part AT&T's participation in the nationwide dissemination of pornography via Cable TV (visited 5/2/05 at 1:09 pm), available at: < http://www.pbs.org/wgbh/pages/frontline/shows/porn >.

[12]See, for example, 2001 SEC No-Act. LEXIS 240, involving the 2001 dispute between AT&T Corp. and certain of its shareholders, who proposed in December of 2000 that AT&T study the social liabilities of adding the Hot Network's pay-per-view films to its cable offerings.

[13]Conversely, the Opposition's suggestion that *Lawrence v. Texas*, 539 U.S. 558 (2003) forecloses Petitioner's claim is patently absurd. The commercial transmission by commercial vendors (such as Respondent Cable TV Operators) of *obscene* Cable TV programming, using an important channel of federal communication (such as Cable TV), is legitimately banned by federal and state law. See *supra*, at footnotes 1, 2, 3, 4, 7and 8.

question in a manner conflicting with the decision of a United States Court of Appeals: See *Time Warner Entertainment Co., L.P. v FCC*, 93 F.3d 957 (App. DC, 1996), 320 U.S. App. DC 294, *reh. en banc, den.* 105 F3d 723, (App. DC, 1997), 323 US App. DC 109. *Time Warner Entertainment* upholds the constitutionality of 47 U.S.C. § 558, *which reimposes liability on cable operators for the transmission of obscene programming.* [14/]

CONCLUSION

For all the reasons stated, Petitioner respectfully prays that this Court grant the Petition, vacate the state judgments below, reinstate Petitioner's Complaint, and issue a summary adjudication (judgment on the pleadings) regarding the *obscenity* of the contested subject matter in accordance with the law expressed by Associate Justice Roy Herndon in his dissent in *Harmer v. Tonylyn Productions, et al.* 23 Cal.App.3d 941, at 946-948, enjoining the continued transmission of the same on Cable TV, and remand the remaining issues (relating to damages, restitution, forfeiture of unlawful profits (contraband), and attorney's fees) back to the State court, or to a Federal Referee under the supervision of this Court, for discovery and trial.

Respectfully submitted,

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[14/] It is impossible to reconcile the *Time Warner Entertainment* case with the California courts' dismissal of Petitioner's Complaint against Respondent Cable TV Operators. See, in particular, *Time Warner Entertainment, supra*, 93 F.3d 957, at Section X, entitled "Obscenity Liability."

CERTIFICATE OF SERVICE

I, James J. Clancy, a member of the Bar of this Court, hereby certify that on this 5th day of May, 2005, three copies of the within:

PETITIONER'S REPLY MEMORANDUM

in the above entitled case were deposited in the U.S. Post Office with Priority Mail postage prepaid, and properly addressed to the below listed parties to the proceedings. I further certify that all parties required to be served have been served:

Clerk, Civil Filing
California Supreme Court
300 South Spring Street
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Re: **Unfair Competition Case. (See Bus.& Prof. Code, §17209, and Cal. Rules of Court, Rule 15(e)(2).)**

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Attorney of Record for ***A.T.&T. Corp., a New York Corporation*** (L.A.C.Sup.Ct.No. LC062475, CoA.No.**B168827**).

The Hot Network, ***The Hot Zone***, ***Vivid Video***, ***Vivid Entertainment Group***, ***Playboy Enterprises, Inc.***, ***Christie Hefner***, ***Playboy Entertainment Group*** (as ***Doe 3***) (L.A.C.Sup.Ct.No. LC062475, CoA.No.**B166374**).

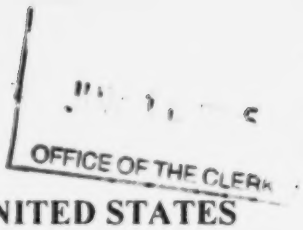
Comcast Corp., a Pennsylvania Corporation (as ***Doe 4***), and ***Comcast of California VII, Inc., a Washington Corporation*** (as ***Doe 5***) (L.A.C.Sup.Ct.No. LC062475, CoA.No.**B171529**).

Dated: **May 5, 2005**

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NO. 04-1205



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

JAMES J. CLANCY, acting as a Private Attorney General and for himself,
PETITIONER

v.

A.T.&T. CORP., a New York Corporation; **COMCAST CORP.**, a Pennsylvania Corporation; and **COMCAST OF CALIFORNIA VII, INC.**, a Washington Corporation,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE

PETITION FOR REHEARING

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JUNE 10, 2005

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PETITION FOR REHEARING 1

I THE "RECORD" FILED IN CONNECTION WITH PETITIONER'S REPLY MEMORANDUM HAS NOT BEEN EXAMINED BY THIS COURT. 1

II *GONZALES V. RAICH* INDICATES THAT THE STATE COURT'S INTERPRETATION OF FEDERAL LAW IN THIS CASE CANNOT BE PERMITTED TO STAND. 5

III A CORRECT INTERPRETATION OF FEDERAL LAW WILL CHANGE THE RESULT IN THIS CASE. RECENT AMENDMENTS TO CALIFORNIA BUSINESS AND PROFESSIONS CODE § 17200 DO NOT AFFECT THE CONTINUED MAINTENANCE OF THE COMPLAINT 6

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

No. 04-1205

JAMES J. CLANCY, acting as a Private Attorney General and for himself, PETITIONER

v.

A.T.&T. CORP., a New York Corporation; COMCAST CORP., a Pennsylvania Corporation; and COMCAST OF CALIFORNIA VII, INC., a Washington Corporation, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION 1.

PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order: (1) vacating its denial of the petition for writ of certiorari, entered on May 16, 2005, and (2) granting the petition. There are intervening circumstances of a substantial or controlling effect, and other substantial grounds appearing in the "record" below not previously presented, which justify granting the petition in this case. As grounds for this motion, petitioner states the following:

I. THE "RECORD" FILED IN CONNECTION WITH PETITIONER'S REPLY MEMORANDUM HAS NOT BEEN EXAMINED BY THIS COURT.

In the week prior to the Court's decision of May 16th, in response to his specific inquiry, Petitioner was informed that the Clerk's office had not distributed to the Court the written Record and Trial Court Exhibits which Petitioner had Express Mailed in connection with

his Reply Memorandum (see Petitioner's Reply Memorandum at footnote 1 on page 2). The Clerk explained that it would not distribute the Record, because "the Court did not ask for the record."

The portion of the Record which was lodged was in response [1] to the Opposition claim that there is no "full record" to review (see Opposition Brief at page 4), and to rebut Respondents' attempt to miscast this case as being controlled by "state law," as opposed to important *federal law* issues. These documents demonstrate the fallacies in the state court's disposition of this case, and establish that Petitioner was denied important basic guarantees of adjudicative fairness, secured by the Federal Constitution.

The main issue here is *not* the question posed by the Respondents in their Opposition. [2] Rather, the *real* issue is: (1) whether or not the *procedures employed* [3] by the state court (in failing to grant Petitioner a hearing on the "*per se*" obscenity and the "*per se*" public nuisance nature of the contested material and in failing to

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[1] A party to a state court proceeding pending before the Supreme Court is free to refer to state court briefs and arguments in the course of filing any kind of a brief or motion in the Court. See Stern & Gressman, *Supreme Court Practice* (8th Edition), at § 3.18, pages 184-185.

[2] Respondents suggested this Court should focus on whether the Appellate Court erred in sustaining the demurrers and in dismissing the Complaint without leave to amend, *based only upon what was discussed in the Court Opinions*.

[3] Under California procedural law, on demurrer, the trial judge cannot look beyond the Complaint itself in making a determination as to whether the Complaint states a cause of action and whether Petitioner has standing to file such a cause of action. The trial judge (1) disregarded these California procedural rules, permitted Respondents to argue facts outside of the Complaint (concerning the content and character of the contested material, signal blocking and scrambling, see *infra* at footnote 8); (2) refused to look at the entire Complaint, see *infra* at footnote 4; (3) refused to adjudicate Petitioner's claim of standing [the Court orally explained to Petitioner that in dismissing the Complaint he was not reaching the issue of standing, see Reporter's Transcript for September 3, 2003, page 12, lines 13-14, in which the Court stated: "This is not a question of standing. I have ruled based upon the pleadings." Petitioner then asked: "Are you holding that I do have standing?" The Court responded: "No, I'm holding that I don't need to get to that. Thank you."]; and (4) refused to allow Petitioner to amend his Complaint in any way. The Complaint is still at the "pleading" stage! The Petition for writ of certiorari seeks relief from due process of law injury – Petitioner was never allowed to get to the trial stage, under the extrajudicial impediments imposed by the California court.

examine the Complaint in its entirety [4]) violated federal due process and equal protection of the law, and (2) whether the State of California improperly construed federal law as permitting and protecting the transmission of obscene Cable TV programming. [5] The portion of the

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[4]The Record establishes that the California court, in response to Respondents' arguments, dismissed the obscenity law causes of action, on the basis that the material alleged to be "obscene" was in fact "protected" without conducting an independent review of the obscenity *vel non* of the contested material, in violation of *People v. Noroff*, 58 Cal. Rptr. 172 (1967), *People v. Noroff*, 67 Cal.2d 791 (1967), and *Jenkins v. Georgia*, 418 U.S. 153 (1974). Moreover, the Record establishes that the California Court refused to look at and consider the supplemental factual allegations contained in the "Time & Motion" Studies which were attached to the Complaint and incorporated by reference. Review of this material would have established, beyond peradventure, that all the elements of the obscenity test articulated in *Miller v. California*, 413 U.S. 15 (1973) were present as a matter of law, and that Petitioner had alleged a *prima facie* violation of state and federal obscenity law.

Using innovative visual techniques, such as the "Time and Motion" Study and timed videotaped or DVD copies of films contested to be obscene, it is possible for a reviewing court to quickly ascertain whether, as a matter of law, the subject matter facially meets the Constitutional test for pleading obscenity expressed in *Miller v. California*, 413 U.S. 15 (1973), or whether, as a matter of law, it is "protected material" under federal law. This pleading technique was used and approved by the California court in the *Projection Room Theater* case. See *People ex re. Busch v. Projection Room Theater*, 17 Cal.3d 42 (1976) and *People ex rel. Busch v. Projection Room Theater*, 16 Cal.3d 350 (vacated) (1976). As a visual pleading technique, these materials constitute "facts" concerning the obscenity of the contested matter, and constitute factual allegations which can establish that the requirements of the three-pronged *Miller* test have been meet and that sufficient facts, setting forth a cause of action based upon obscenity law violations, have been pleaded. Using the fast forward device of a videotape or DVD player, it is possible to review 8 hours of obscene programming in approximately 1.5 hours, and to ascertain that each of the three elements of the *Miller* test has been met (*i.e.* pruriency, the use of patently offensive representations or descriptions of explicit sexual conduct, and lack of serious literary, artistic, political, or scientific value).

[5]The Trial Court issued its judgment based on a *misconstruction of federal law*, and, in addition, denied Petitioner his rights under applicable state procedural law, by refusing to review the Complaint in its entirety, before dismissing it. These violations denied Petitioner fundamental rights and deprived him of federal due process and equal protection of law. With respect to the propriety of the Cable TV Operators' conduct in transmitting sexually explicit, obscene Cable TV programming, the Record shows that the decision of the California Court to permit such conduct was premised on its interpretation of federal, not state law, and as such, is subject to review by this Court. See *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986).

Trial Court record (which is now in the hands of each Justice on this Court) shows these issues were raised but were completely ignored by the California courts. As a matter of Federal Constitutional law, the demurrers could not and cannot be sustained and the judgments of dismissal of Petitioner's Complaint without leave to amend could not and cannot be validly affirmed.

The federal interests at stake in this case cannot be satisfied by the state court's ordering that the text of its questionable opinions be "not published." They can only be vindicated by the Court's review of the Petition. Questions arising in actions in state courts relating to the scope or construction of federal law or rights guaranteed under the Constitution are, of course, federal questions which may appropriately be reviewed by this Court. [6/]

Respondent Cable TV Operator AT&T had argued that the Cable TV Operator's conduct (in transmitting sexually explicit material) was *protected* activity under federal cable law, and the California Courts adopted this reasoning. See Record at Exhibit 54, entitled "Plaintiff's Objections to Reply of Defendant AT&T Corp."at page 7, discussed *infra* at Point II. The Record shows that there is no "independent state ground of decision," because the state law relied upon by the Court incorporated federal law. *Cf. Delaware v. Prouse*, 440 U.S. 648 (1979). As grounds for sustaining the Cable TV Operators' demurrers, the California Court adopted the Cable TV Operators' argument that they could not be held liable for transmitting sexually explicit programming, even if alleged to be obscene under federal obscenity laws. It is evident that the state court misinterpreted federal law and believed itself to be bound by the Cable TV Operator's argument that federal precedents, such as *Playboy v. United States*, 529 U.S. 803 (2000), *protected* Respondents' activity. See discussion, *infra*, at Point II. A ruling by this Court, correcting the state courts' error, would free the state court to act against the transmission of obscene Cable TV programming. *Cf. S. Dakota v. Neville*, 459 U.S. 553 (1983); *Montana v. Jackson*, 460 U.S. 1030 (1983); and *Texas v. Brown*, 460 U.S. 730 (1983). Reversal of the state court's decision as to the Cable TV Operator's liability for the transmission of obscene Cable TV programming, would change the outcome of this case. See Erwin Chemerinsky, *Federal Jurisdiction, Second Ed.* (Aspen Lw & Business 1994) , at page 615: "If the Supreme Court's reversal of the state court's decision as to federal law would change the outcome in the case, then quite obviously, the Court can hear and decide the matter."

[6/] As stated in *St. Louis, Iron Mountain and Southern Railway Company v. Taylor*, 210 U.S. 281, 293 (1908):

> "Where a party to litigation in a state court insists... upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this

Inspection of the whole record leads to the inescapable conclusion of law that in dismissing petitioner's complaint both the California trial and appellate courts (1) misconstrued acts of Congress, and (2) denied petitioner due process and equal protection of law by their staunch refusal to review the complaint in its entirety and to follow California procedural and substantive law regarding demurrers.

II. *GONZALES V. RAICH* INDICATES THAT THE STATE COURT'S INTERPRETATION OF FEDERAL LAW IN THIS CASE CANNOT BE PERMITTED TO STAND.

Pursuant to the principles expressed in *Gonzales v. Raich*, No. 03-1454, (decided June 6, 2005), this Court should correct the State Court's misinterpretation of federal law concerning the federal issue involved. *Gonzales* is relevant to this case, because it indicates that where federal law regulates or bans an activity in a comprehensive manner, the state lacks the power to use state law to shield such activities [7/] or to issue legal interpretations that would place these activities beyond the reach of enforcement action. This case turns on the primary *federal* issue involved, namely, whether the contested Cable TV Programming under federal law is *obscene per se* and a *per se* public nuisance, or is merely some type of "Adult Material" falling

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respect, being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union.

"It is clear that these principles govern the case at bar. The defendant, now plaintiff in error, objected to an erroneous construction of the Safety Appliance Act, which warranted on the evidence a judgment against it, and insisted upon a correct construction of the act, which warranted on the evidence a judgment in its favor. The denials of its claims were decisions of Federal questions reviewable here." (Our Emphasis.)

[7/] Which in this case violate both state and federal obscenity law and which constitute a "*per se*" moral public nuisance.

outside the prescription and control of judicial action. [8/]

This case is of National importance. The state of California has erroneously "adjudicated" that federal law *blocks lawsuits against Cable TV Operators who are transmitting obscene* Cable TV programming. This state court misinterpretation of federal law gives rise to potentially harmful results of wider import than just the result in this one case. There is a legitimate federal interest of 49 other States in assuring that the federal obscenity laws are uniformly interpreted in the context of the delivery of Cable TV services.

III. A CORRECT INTERPRETATION OF FEDERAL LAW WILL CHANGE THE RESULT IN THIS CASE. RECENT AMENDMENTS TO CALIFORNIA BUSINESS AND PROFESSIONS CODE § 17200 DO NOT AFFECT THE CONTINUED MAINTENANCE OF THE COMPLAINT.

The Complaint alleges facts which support the conclusion that Respondent Cable TV Operators were engaged in an illegal commercial business scheme to make money by soliciting orders and transmitting obscene Cable TV programming into customer homes located in the Area D Cable TV Franchise in Los Angeles, California, in violation of state and federal obscenity law.

Respondents' decision to provide obscene material was made in a calculated business fashion, over the objection of its shareholders. [9/] In providing Cable TV subscription service to the Area

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[8/]The Complaint alleged, and Petitioner argued to both the trial and appellate courts, that the named Cable TV programming violated state and federal obscenity laws. The Cable TV Operators did not assert that this programming was "non-obscene" material; rather, they asserted that it was merely "sexually explicit" and incorrectly (but successfully) argued to the California Courts that it was "protected" by this Court's decision in *United States v. Playboy*, 529 U.S. 803 (2000). It is this Court's duty to correct the California Court's misconstruction of the federal obscenity statutes (47 U.S.C. §§ 558 and 559 and 18 U.S.C. § 1468), and the improper extension of the *Playboy* case to protect material which is alleged to be obscene.

[9/]See 2001 SEC No-Act. LEXIS 240. Before such service commenced, shareholders of Respondent Cable TV Operator AT&T questioned the policy behind

D Franchise customers, and in selling and transmitting obscene Cable TV programming. Respondent Cable TV Operators wrongfully advertise that such material was and is legal "adult material."

Respondents' transmission of obscene Cable TV programming violates California Business and Professions Code § 17200 *et seq.*, sometimes referred to as the "unfair competition law" or "UCL." [10/] Approximately three years after Petitioner [11/] filed his complaint

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the decision to provide "hard-core" sexually explicit programming and requested that it be placed before the shareholders at the annual shareholders' meeting in May 2001. The shareholder proposal requested a report on possible legal exposure, and called for the Company to "describe" the "legal issues," if any, which might arise with respect to the Company's pandering of pornography. The shareholders also expressed concern that organized crime was reported to have widespread influence and control of the sex industry, pointing to the 1997 guilty plea of Kenneth Guarino to Federal conspiracy charges, quoting newspaper reports stating: "Yesterday's plea agreement said Guarino, 47, and his business interests have been controlled for years by a top-ranking member of the New York based Gambino crime family, Natale Chris Richichi." In this regard, see *Capital Video Corp. v. Comm'r*, 311 F.3d 458 (2002)[rejecting the deductibility of legal fees paid for a defense against criminal charges], which stated at 461: "In 1979, Kenneth Guarino created and incorporated Capital Video Corporation, located in Cranston, Rhode Island; Guarino was the sole shareholder. Capital Video was a distributor of pornographic videotapes. Guarino was associated with Natale Richichi, a capo in the Gambino family of La Cosa Nostra, who dealt directly with the bosses of both the Gambino and Patriarca families and had influence with other factions of La Cosa Nostra." Guarino has been characterized as "an expert corporate shell shuffler" who created "dummy corporations and business spider webs to launder mob money, avoid taxes and set up large offshore savings accounts." See Internet article entitled "Ken Guarino," visited 6/9/2005, at http://www.lukeford.com/stars/male/kenneth_guarino.html. Respondent Cable Operator rejected the shareholders' objections, asserting that such matters related to "ordinary business operations."

[10/] The California Courts have held that violations of the state obscenity code, California Penal Code § 311.2, are specifically actionable under § 17200, see *People v. E.W.A.P.*, 106 Cal.App.3d 315 (C.A.2, Div. 5, 1980).

[11/] Petitioner is a former governmental attorney, who since 1965 to the present has specialized in providing legal services in support of law enforcement in the obscenity area, acting as consultant with state and federal law enforcement officials and legislators on obscenity matters. Petitioner has authored or co-authored *amicus curiae* briefs in support of law enforcement in obscenity litigation in over 40 cases before the United States Court; conducted seminars for law enforcement officials and prosecutors in various states; and given testimony before numerous legislative bodies

(November 2, 2004), a ballot initiative measure (Prop. 64) was adopted that amended the UCL by narrowing the standing requirement for §17204, but which retained the private citizen action for plaintiffs who have experienced some financial loss as a result of defendant's conduct. Because Petitioner will have no difficulty in meeting the new requirements [12/] (whether or not Prop. 64 is found to be retroactive [13/]) Prop. 64 does not bar Petitioner's action under the UCL based upon Respondents' illegal activity in transmitting obscene Cable TV programming.

CONCLUSION

Petitioner respectfully urges that the Members of this Court can no longer enjoy the luxury of dealing with the obscenity problem purely as an "abstract" issue, but must enter the "trenches" where the battle is raging. As a post-mortem analysis of "real life" problems,

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regarding enforcement procedures and reform of the law in the area of obscenity. During the past 35 years, Petitioner has successfully pioneered the development of a means of controlling the social problem of obscenity through an application of the civil public nuisance abatement lawsuit to the exhibition of *per se* obscene videotapes and motion pictures as moral public nuisances, with its attendant relief of compensatory and punitive damages, the ancillary remedies of constructive trust of box office receipts, forfeitures, injunctions and award of attorney fees. For the past 4 years (since 2001), he has devoted attention to developing a means of controlling the social problem of obscenity through a use of the civil public nuisance abatement lawsuit, joined with the use of state consumer protection laws.

[12/] The issue of retroactivity was not discussed in the trial court record which is before this Court, was not an issue on appeal, and does not now preclude this Court's review of the federal issues presented in the Petition. During the 3.5 years that Petitioner has pursued this case in the Courtroom, he has sought restitution for the moneys charged by Respondent Cable TV Operators, which he personally paid, and which were extracted by Respondents for their transmission of the obscene Cable TV programming named in the Complaint. In addition, the Complaint complies with the "class action" requirements of California Code of Civil Procedure § 382. Thus, the Record demonstrates that the Complaint complies with Prop. 64's new requirements for: (1) standing under § 17204 (Petitioner having suffered "injury in fact" and having "lost money or property as a result of such unfair competition"); and (2) the maintenance of representative actions under § 17203 (Petitioner having complied with CCP § 382). See Complaint, at paragraph 80, pp. 57-58.

[13/] The issue of the retroactivity of Prop. 64 is now before the California Supreme Court in *Branick v. Downey Savings and Loan Association*, S132433, see 2005 Cal. LEXIS 4598 (April 27, 2005), and 2005 Cal. LEXIS 5404 (May 18, 2005).

Petitioner is filing with this Petition (as **Exhibits 1** and **2**) 10 copies of two 8-hour videotaped recordings of the so-called "sexually explicit" Cable TV programming transmitted by Respondent Cable TV Operator Comcast [14], with a recommendation that each Justice and his or her respective law clerks view each tape in conference on a television monitor, using the "fast forward" mode, (which requires approximately 1.5 hours of viewing per 8 hour tape) in order to glean an understanding of the potential damage which will be wrought from failure to clarify the federal law in this area. This Court's opinion in *Playboy v. United States*, 529 U.S. 803 (2000) does not "protect" or insulate Cable TV Operators from being subjected to state or federal obscenity lawsuits based on the transmission of this type of material, where the Complaint alleges and contends that it is "*per se* obscene" and a *per se* public nuisance (*i.e.*, reasonable minds would not differ).

If the nine Members of this Court accept the Petitioner's challenge, they will acquire a "unique" understanding of what is at risk in this Court's deliberations in this particular case. [15] In the interest of preserving the proper respect for the Constitutional principles protecting Free Speech and the First Amendment, Petitioner respectfully urges that this Court take action. This grossly improper interference with the legitimate interests of society in the enforcement of the obscenity laws must be curtailed.

This Court can remove a serious roadblock by (1) vacating its denial of the petition for writ of certiorari in this case, entered on May 16, 2005, and (2) granting the petition. The subject matter of this lawsuit meets the pleading requirements and the obscenity test articulated in *Miller*, as a matter of law (reasonable minds would not differ). This Court should clearly reiterate that any Cable TV Operator responsible for the transmission over Cable TV systems operated by

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[14] Transmitted to Petitioner over Playboy Channel 451 on Monday, May 16, 2005 and on Tuesday, May 17, 2005.

[15] Many years ago, this Court observed in *Couch v. United States*, 409 U.S. 322 (1973):

> "It is important, in applying constitutional principles, to interpret them in light of the fundamental interests of personal liberty they were meant to serve. Respect for these principles is eroded when they leap their proper bounds to interfere with the legitimate interest of society in enforcement of its laws. . ." (Emphasis added.)

them of Cable TV programming which is obscene under *Miller*, may be subjected to liability under state and federal obscenity law, in accord with *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (App. DC, 1996), 320 U.S. App. DC 294, *reh. en banc, den.* 105 F.3d 723 (App. DC, 1997), 323 U.S. App. DC 109, 1996 U.S. App. LEXIS 22387 pages 69-72 (upholding the constitutionality of 47 U.S.C. § 558, which reimposes *criminal* liability on Cable TV Operators for the transmission of obscene programming). [16] Further, the now defunct *criminal exemption* had no effect whatsoever on the civil public nuisance abatement process. Now is the time to make that distinction clear in this civil public nuisance abatement lawsuit.

Dated: June 10, 2005

Respectfully submitted,

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[16] See *Time Warner*, 1996 U.S. App. LEXIS 22387, at 69-70, which states:

"We agree with the district court that the 1992 Act's revocation of cable operators' immunity from liability for obscene programming carried on . . .leased access channels does not violate the First Amendment. §10(d), 106 Stat. at 1486 (codified at 47 U.S.C. § 558). Section 10(d) merely imposes upon cable operators the same responsibility that others face. As the district court pointed out, 'no speakers--cable operators included--have a constitutional right to immunity' from obscenity liability. *Daniels Cablevision*, 835 F. Supp. at 11. . .; see also *Sable Communications*, 492 U.S. at 124-25. Although the 1984 Act initially made cable operators immune from any liability for obscene programming carried on . . . leased access channels, 1984 Act, § 2, 98 Stat. at 2801, 'Congress' earlier decision to provide cable operators with immunity was a matter of grace that it has always been free to rescind.' *Daniels Cablevision*, 835 F. Supp. at 11. Cable operators at times may find it difficult to determine which programs are obscene. However, such difficulties arise whenever the government regulates obscene materials; they are insufficient to render an antiobscenity law unconstitutional. *Fort Wayne Books, Inc. v.Indiana*, 489 U.S. 46, 60, 103 L. Ed. 2d 34, 109 S. Ct. 916 (1989); Denver, 116 S. Ct. at 2390 (plurality opinion)."

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2

Carol A. Clancy

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